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MAY 25 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1928

No. [redacted], Original.

STATE OF NEW JERSEY,
Plaintiff,
against
THE CITY OF NEW YORK,
Defendant.

MOTION FOR LEAVE TO ANSWER AND ENLARGEMENT OF TIME TO ANSWER.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

NEW YORK:
M. B. BROWN PRINTING & BINDING CO.,
37-41 Chambers Street.

1929

(44484)

In the
Supreme Court of the United States

OCTOBER TERM—1928.

No. 21, Original.

STATE OF NEW JERSEY,
Plaintiff,
against
THE CITY OF NEW YORK,
Defendant.

Notice,

To:

Hon. WILLIAM A. STEVENS,
Attorney General of the State of New Jersey,

Hon. DUANE E. MINARD,
Assistant Attorney General of the State of New Jersey,

Solicitors for Plaintiff.

Sirs:

Please be advised that on Monday, May 27, 1929, the annexed motion will be presented to the Court and application made for the relief therein prayed.

Dated, New York, May 25, 1929.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1928.

No. 21, Original.

STATE OF NEW JERSEY,
Plaintiff,
against
THE CITY OF NEW YORK,
Defendant.

In Equity.

MOTION FOR LEAVE TO ANSWER AND FOR ENLARGEMENT OF TIME TO ANSWER.

Comes now the defendant, The City of New York, by its Corporation Counsel and Solicitor and shows as follows, to wit:

1. That pursuant to leave of this Court granted on the 20th day of May, 1929, the State of New Jersey has filed in this Court a bill of complaint against the defendant The City of New York, praying that this Court grant to the plaintiff the United States' writ of injunction perpetually restraining he defendant from dumping garbage and other matter into the Ocean or other waters of the United States off the coast of New Jersey and for other relief.

2. That the suit in equity of the State of New Jersey so permitted, by this Court, to be commenced was docketed as number 21, Original, October Term—1928, on the 22nd day of May, 1929.

3. That this Court's subpoena to answer the aforesaid bill of complaint was issued therefrom

under date of May 21st, 1929, and was received by the defendant on May 23rd, 1929. In and by said subpoena the defendant was directed to appear and answer before this Court on May 27th, 1929; and not within twenty days after the issuance and service thereof as provided in Rule XII of the Rules of Practice for the Courts of Equity of the United States.

4. That, within the brief time since the defendant first received a copy of the bill of complaint herein, which was on or about May 9th, 1929, less than 20 days before it is required to answer thereto, the defendant has been and is unable to prepare its answer herein, which inability is partially due to the necessary preoccupation of its Corporation Counsel and his Assistants in the preparation of an answer on its behalf in the suit now pending in this Court, and brought by the same plaintiff against the State of New York and this municipality as defendants.

5. That the plaintiff, as the defendant is advised, consents to an enlargement of the time of the defendant within which to answer herein.

The defendant prays, therefore, that it be permitted to answer herein, that its answer, when prepared, be received and filed, and that its time within which to present and offer for filing its answer to the bill of complaint herein be enlarged and extended for sixty days from May 27th, 1929.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for Defendant.

J. JOSEPH LILLY,
of Counsel.

FILE COPY

MAR 20 1931

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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No. 18, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER

TOPICAL INDEX.

	Page
PLEADINGS	
Bill	3
Answer	3
AMENDED ANSWER	6
PARTIES AND JURISDICTION	7
FINDINGS OF FACT	9
GENERAL STATEMENT	9
Locality	10
Area Affected	10
Summer Resorts	10
Beaches	11
Fishing	11
Bathing	13
Garbage	14
Removal and Expense	14
Water and Fish Nets	17
Occur, when	17
Dumping	18
History of Dumping	18
Complaints	19
Supervisor's Reports	21
Quantities	23
Appearance and Movement	24
Incinerators	24
SOME ISSUES OF FACT	27
SOME QUESTIONS OF LAW	30
Trespass	36
Permits	36
Nuisance	41
Prescription	49
Municipality: Degree of Proof	53
Jurisdiction	54
RECOMMENDATIONS	57
	59

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 18, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER.

To the Supreme Court of the United States:

In the above entitled cause this Honorable Court appointed me as Special Master by its order dated October 14, 1929, as follows:

"And it is further ordered that the Honorable Edward K. Campbell be and he is hereby appointed Special Master in this cause with power to summon witnesses, issue subpoenas and to take such testimony as may be introduced and such as he may desire to call. The master is directed to make findings of fact and conclusions of law and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions and recommendations of the master shall be subject to consideration, revision or approval by the Court."

The parties to the suit, by their respective counsel, appeared before me in Washington, in compliance with my request, in November, 1929, when a time was fixed for the taking of proof. Public hearings began at Asbury Park, New Jersey, on December 11, 1929, continuing for three

days. Another public hearing was held at Asbury Park on January 15, 16, and 17, 1930; and another at the same place on January 22, 23 and 24, 1930. At these hearings more than one hundred and fifty witnesses for the plaintiff were examined.

Public hearings were resumed in the City of New York on March 24, 1930, and continued through March 27, 1930. On April 8, 1930, a public hearing was had at Newark, New Jersey, when witnesses were examined.

Another public hearing was held at Washington, D. C., on December 5, 1930, and some additional proof was admitted without objection. At that time at the request of counsel and to afford time for preparation for argument and briefs the Special Master set February 4, 1931, as the date upon which arguments would be heard, and on the last named date counsel were heard in oral argument. The motion to amend the answer was then pending.

Except to call upon the defendant to file a statement from its records showing the quantities of garbage and refuse dumped at sea for each of the years 1925 to 1929, both inclusive, I did not deem it necessary to call other witnesses.

Now pursuant to the above-mentioned order I have reported the testimony and the exhibits received by me as Special Master, by filing the same in the office of the Clerk of this Court with my certificate, and I herewith submit to the Court my findings of fact, conclusions of law and recommendations.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 18, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER

PLEADINGS.

The Bill.

The State of New Jersey exhibited its original bill in the Supreme Court of the United States against the City of New York, a municipal corporation under the laws of the State of New York, by which the State seeks an injunction restraining the City, its contractors and agents from dumping garbage or refuse into the waters of the Atlantic ocean off the coast of New Jersey and from defiling the waters and polluting the beaches of said State.

(1) The Court's jurisdiction is alleged to depend upon the ground that the suit is one in which a state is a party within the provisions of Article III, Section 2 of the Constitution of the United States.

(2) The Bill describing the location of the State as bordering on the Atlantic Ocean for more than one hundred miles alleges that the portion of ocean frontage more directly affected by the matters complained of extends from Atlantic Highlands to Beach Haven, a distance of approximately fifty miles, occupied by a continuous succession of municipalities which because of their beaches are adapted to, and their inhabitants are engaged in and rely for their livelihood chiefly upon, the business of maintaining sum-

mer resorts to which great numbers of people come in the pursuit of rest, recreation and pleasure..

(3) It is alleged that the plaintiff possesses the sovereign ownership of the lands along the shore and under the waters of the ocean below highwater mark throughout its beach front within its territorial limits and that the use of the said beaches and the adjacent waters are common to the people of the State.

(4) That said seashore is famous as a summer resort and has been greatly improved by piers, wharves, pavilions, bathing beaches and other conveniences for the health and recreation for citizens of the State and other people resorting to these places and that along the seashore and for some miles landward the territory is improved by hotels, pleasure resorts, country clubs, residences and large estates which are provided and maintained at great expense for the benefit of summer visitors and residents. That the waters of the ocean adjacent to the said shore and beaches are largely used for surf-bathing and for pleasure boating, for fishing and other purposes, and that many millions of dollars have been invested within the beach section in hotels, bathing pavilions, piers for landing and for pleasure, boardwalks, boulevards and facilities for pleasure and profit, and that several thousands of people are constantly employed to maintain and operate the same.

(5) That the section in question lies between the two great metropolitan areas of New York and Philadelphia and within easy access and commuting distance by rail or motor vehicle of people within these areas; that many persons commute daily between the seashore and their places of business, and the seashore is visited by many thousands of visitors and excursionists during summer months and over holidays and week ends.

(6) That the growth, prosperity and substantial property values of the seashore communities in question are the result of enterprises dependent upon the population and the suitability of said waters, beaches and shore front fa-

cilities for fishing, boating, bathing and other seashore recreations and pursuits, and that the continuance of these agencies depends primarily upon the ability of the State or its citizens and municipalities to keep the waters wholesome and the beaches and sea front property free from pollution, contamination, and unsightly and unhealthful conditions.

(7) That along the beach section in question are located many fish pounds, constructed under licenses granted by the State or one of its departments and maintained by its citizens who have made investments in the fishing business of large sums of money; that the production of these fish pounds in one year amounts to approximately 20,000,000 pounds of fish, having a value of nearly a million dollars, and that the industry gives employment to approximately 500 men.

(8) It is alleged that the defendant, with a population exceeding 6,000,000 of people and increasing annually, disposes of garbage and other refuse by transporting the same in barges towed out and dumped into the navigable waters of the United States off the complainant's coast and that many barge loads are so disposed of daily and may constantly increase. The Bill specifies a number of articles and things composing the garbage and refuse, much of which, it is averred, is in a putrid and decayed condition. It is alleged that a considerable proportion of said garbage and refuse floats upon and beneath the surface of the sea in masses or islands which obstruct and impede fishing boats and other craft until it is driven by the wind and tide upon the said beaches and cast thereon by waves in heaps and windrows and under or about the piers, wharves, adjacent boulevards and private property, where it decays and pollutes the sea and land unless and until removed and disposed of by the municipality or citizens. That this removal or disposition from the beaches and places affected requires large expenditures by the municipality and other large sums by citizens of the State.

That said garbage or refuse in the water and cast upon the beaches and property of complainant and its citizens, is poisonous and otherwise injurious to human beings and to the fish and other forms of marine life; that it impedes the open navigation of the Waters of the United States clogs, tears and injures the net of the fish pounds, and renders the waters noxious, offensive and unfit for fishing, boating or bathing, and that the dumping of garbage and refuse by the defendant creates a public nuisance which seriously impairs the usefulness, wholesomeness and safety of said waters, beaches and short-front facilities and of the property of the plaintiff, of the municipalities and its citizens, and thereby greatly damages the property, seriously menaces the health and safety of the plaintiff and its citizens; that said acts are and will be repeated and continued from day to day, and that the plaintiff is without adequate remedy at law.

(9) It is further averred that the acts complained of—

(a) Take the property of complainant and its citizens without due process of law in violation of Article XIV, Section 1 of the Constitution;

(b) Regulate and destroy the commerce of the plaintiff and its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution;

(c) Deprive plaintiff and its citizens of the natural advantages of their property along the seashore contrary to its sovereign rights as a member of the Union, and,

(d) It violates Title 33, Chapter IX, Section 407 of the United States Code and other laws of the United States and that said acts are otherwise detrimental to the interests of the plaintiff and its citizens.

ANSWER.

The answer of the City of New York, except in its admission of the averments as to its own population, was substantially a general denial of the allegations of the Bill.

Issue was joined upon this answer.

After the testimony was concluded and the day had been fixed for argument before the Master, the defendant on, to wit, February 2, 1931, filed its motion in this Court for leave to file its amended answer. This motion was allowed by the Court on February 24, 1931, by an order reading as follows:

"The motion of the defendant for leave to file an amended answer and to withdraw the answer heretofore filed in this cause is granted; provided that the plaintiff's reply to the original answer may, if desired, be deemed the reply to the amended answer and that all proceedings heretofore taken herein shall stand and shall be regarded as having been taken as if the amended answer had been originally filed and without reopening the evidence."

AMENDED ANSWER.

The answer denies many of the averments of the bill, and not admitting others sets forth "for a first defense":

(1) That the defendant has for many years last past dumped the garbage and some refuse collected by it in the Atlantic Ocean, under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said Supervisor under the authority conferred on him by the Act of June 29, 1888 (25 Stat. 209), as amended, and now Title 33, Secs. 441, 443, 449 and 451 of the U. S. Code) "at points eight, twelve, and twenty miles southeast of Scotland Light Ship and about ten, twelve and a half and twenty-two miles distant respectively from New Jersey shore (being greatly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States; that in view of the dumping of said garbage and said refuse on the high seas by the said City of New York in the manner and at the points aforesaid this Court has no authority to enjoin the said city, the defendant herein, from said dumping of garbage or refuse so performed."

(2) And further answering and "for a second defense" the defendant alleges: "6. That garbage and refuse in large quantities," including various materials set forth in the answer, "has for many years last past been and are being dumped into the Atlantic ocean from steamships and other floating equipment, both inside and outside of the entrance to New York harbor and into the sea lanes for vessels clearing for ports south of New York and returning therefrom at distances from two-and a half to eight miles from the shore of New Jersey, from Highlands to Barnegat Lighthouse", and that great quantities of condemned food stuffs are and have been for many years dumped at sea at a point about twenty-five miles southeast of Scotland Lightship, and that private contractors have, for many years last past, dumped, under permits issued by the Supervisor of the Harbor of New York under said statute, into the Atlantic ocean at points from three to eight miles southeast of Scotland Lightship, "excavated and refuse materials from demolished buildings in the City of New York, which materials often contain large quantities of refuse, and other things mentioned; and that such private contractors and the United States Navy Yard have for many years been dumping garbage into said ocean either at points from eight to twenty miles distant from said Scotland Lightship or nearer thereto under such permits issued by the Supervisor of the Harbor of New York; and further that insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park for a number of years last past has been and is being discharged into the Atlantic ocean at short distances from the beaches of each of those cities; and that all of the garbage, refuse and sewage and offensive matter is the same kind and character as that dumped by the City of New York at points eight to twenty miles southeast of Scotland Lightship and from ten to twenty-two miles from New Jersey shores. That "such garbage, refuse, sewage and other offensive matter discharged as aforesaid by private contractors, by

the United States Navy Yard authorities and by said New Jersey cities into the water of the Atlantic ocean in large quantities would float under the influence of the tide and wind into the water and on to the beaches of the State of New Jersey and its municipalities claimed to be polluted in this action" and "it is impossible to determine whether garbage or offensive materials in substantial quantity dumped by the City of New York is deposited in the waters of New Jersey and on its beaches or in greater quantities than that deposited in the sea by other agencies than the City of New York; and that if any injuries or damages are suffered by New Jersey or its citizens or to their health, safety or property it is not chargeable to the acts of the defendant; and

(3) "For a third defense the defendant alleges that the bill of complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to any relief."

PARTIES AND JURISDICTION.

This is an original action brought by the State of New Jersey under authority of a resolution of its Legislature, approved April 16, 1929, by direction of the Governor of the State.

The defendant is the City of New York, a domestic municipal corporation, created by and existing under the laws of the State of New York.

The case presents a justiciable controversy over which this Court has jurisdiction. (Art. III, Sec. 2, Const. of the U. S.) (*Georgia* v. *Tennessee Copper Company*, 206 U. S. 230; *Missouri* v. *Illinois*, 180 U. S. 208; 200 U. S. 496. *New York* v. *New Jersey*, 256 U. S. 296; *Wisconsin* v. *Illinois*, 278 U. S. 367, 418).

FINDINGS OF FACT.

The facts deemed to be established by the evidence and which may be considered material to the contentions of the

parties relative to the locality and area affected, summer resorts and beaches, fishing and boating; garbage conditions and effects thereof on the beaches, and their removal, effect on surf bathing and the frequency of garbage deposits and cause thereof; also some history of the dumping by defendant of garbage and refuse, at sea, and reports by the Supervisor of the Harbor of New York, the quantities of garbage or refuse dumped, their movements, also relative to complaints of conditions caused by the deposits, and to matters alleged by defendant in defense; and some other matters hereafter noted, are as follows:

GENERAL STATEMENT.

(1) Locality.

The State of New Jersey on its easterly side borders on the Atlantic Ocean for a distance of about one hundred miles. A reduced copy of a map in evidence, showing the geographical location, is made an exhibit to the bill.

(2) Area Affected.

(a) The part of the State affected more directly by the matters complained of is that portion of the ocean frontage extending from a point at or near Atlantic Highlands southward to Beach Haven, a distance of approximately fifty miles and inward from the shore at various distances. Within this fifty miles of ocean frontage there are twenty-nine separate municipalities of the State.

(b) The State of New Jersey, as the proprietary owner of the seashore, has at different times conveyed to these several municipalities, and in some instances by lease or otherwise, to individuals designated, portions of the frontage under water. No material changes have occurred since 1928 and in that year the ownership of the frontage under water along the said fifty miles of coast line was as follows:

The State owns approximately 285,000 lineal feet be-

tween Sea Bright and Beach Haven; the municipalities, approximately 13,000 lineal feet, and private parties approximately 64,000 lineal feet.

The aggregate resident population of these municipalities exceeds 160,000. Their summer visitors exceed this number many times over. For instance, Allenhurst, a residential place, has a winter population of 1,000, and a summer population of 3,000. Bayhead has a winter population of 300 and a summer population of some 6,000 or 8,000; Bradley Beach (winter), 5,000, (summer), 30,000 to 40,000; Ocean Grove (winter), 4,000, (summer), 35,000 to 40,000. The figures given are approximated. Other municipalities show about the same general ratio between their winter and summer populations.

The assessed value of property within said 29 municipalities for state tax purposes for the year 1929, including hotels, boarding houses, private houses and places of business, exceeded $139,000,000.

(3) Summer Resorts.

These municipalities are seashore resorts, inhabited and maintained as such for the benefit of residents and visitors. Many thousands of visitors frequent them during the summer season solely on account of the benefits and the attractions of the sea and the beach for fishing, boating, bathing and other recreational purposes. There are visitors to some of them at other seasons of the year than the summer who go there for the benefits afforded by the ocean and air.

(4) Beaches.

(a) The beaches along said frontage afford natural advantages for seashore resorts and from an early date have been well and favorably known and patronized as such. To these natural advantages have been added many

improvements for their protection and improvement, in the erection of jetties and piers, board walks and pavilions, pools and bathing facilities, ocean front casinos, and amusement facilities designed and constructed for the use and enjoyment of residents and visitors. Upon these the State and the municipalities and citizens have expended more than $14,000,000. Other projects already planned call for additional large expenditures of money. These beaches are within easy access of people residing in the metropolitan areas of New York and Philadelphia, and conveniences of travel to them are supplied by railroads, good roads, motor cars and busses. They are accordingly visited by people from these areas in great numbers as well as by people from other parts of the United States and from abroad and from all parts of New Jersey. A record kept of the number of people brought by excursions run by two railroads entering Asbury Park, during a period of years shows that in 1924 there were more than 256,000, and in 1929 more than 160,000. Its resident population is about 20,000.

The inhabitants of these municipalities depend for their livelihood chiefly upon the business of maintaining summer resorts. The ocean, with its uses and suitableness for bathing, for fishing and boating is the chief attraction which they can offer visitors. People congregate at them in numbers in the pursuit of rest, recreation, health and pleasure. Clean beaches are of the utmost importance to the comfort of visitors and the prosperity of residents at these resorts.

A large number of photographs were introduced and filed as exhibits, showing the crowded condition of beaches by people assembled there to take part in or witness the bathing and enjoy the beaches and ocean.

There are many private homes in the several towns and boroughs. In many of these the owners reside during the summer and commute to their places of business in New York, Philadelphia or some place in New Jersey.

(5) Fishing.

(a) The statutes of New Jersey provide for a license to be issued by its Board of Fish and Game Commissioners upon due application therefor for the taking of fish by means of fish pound nets, and make it unlawful to erect and maintain fish pound nets in any of the waters of the Atlantic ocean "within three nautical miles from the coast line" without first having procured such license, (N. J. P. L. 1919, page 214). Numerous citizens have constructed and operated such "fish pounds" under licenses within the prescribed area adjacent to the shore and have invested many thousands of dollars in the business of taking fish. The conduct or operation of these fish pounds and the handling of the catch gives employment to approximately 500 persons.

The fish pound nets are extended from a point about a quarter of mile from shore outward for a distance of approximately 1500 feet, in water from twenty to thirty-five feet deep, are supported by poles driven in the bottom, the pounds or traps being at the outer end. When fish feeding along the coast come in contact with the net, which serves as a wier, they turn toward deeper water, following the net and the contraption is such that the fish are thus led into the trap from which they cannot extricate themselves and from which they are taken.

More than one hundred of these fish pounds are located at divers places off the coast of plaintiff and large quantities of fish are taken annually and sold from them. The value of the fish pounds in 1928 was approximately $700,000. The fish caught amounted to approximately 25,000,000 pounds and sold for approximately $950,000. Less fish were taken in 1928 than in 1924, 1925 or 1926, but more in 1928 than in 1927.

(b) Fishing as a sport is engaged in by many persons using boats or the piers or the shore from which to cast their lines and furnishes an attractive feature of these resorts.

(6) Bathing.

(a) One of the most favored uses of said ocean front is the surf bathing. Visitors and residents are attracted by the same and when the water is not unsuitable use and enjoy surf bathing in great numbers. The continued attractiveness of the resorts depends on the water along the shore being wholesome and suitable for the purposes of summer resorts and the beaches free from pollution and unsightly or unhealthful conditions.

(7) Garbage.

Vast quantities of garbage and refuse are stranded on the beaches in question, cast thereon from and by the waters of the ocean and extending in piles and windrows along the same. The general constituents of these deposits of garbage and refuse are:

(1) Garbage of all kinds, including vegetables, such as cabbage, kale, potatoes, onions, peppers, greens, tomatoes, turnips, and other kinds; and fruits, such as oranges and grapefruit and the skins and parts of either; and melon rinds, banana skins, apples and other kinds, besides bread and pieces of meat large and small and remnants from the kitchen; and many of these when cast upon the beach are in advanced stages of decay and rottenness.

(2) Intermixed with the foregoing is frequently found a soft and grease-like matter that settles on the beach and renders passage thereon extremely disagreeable because it adheres to the feet and is odorous.

(3) Large numbers of electric light bulbs and pieces thereof; glass bottles, whole or broken.

(4) Dead dogs, dead cats and dead fowls.

(5) Pieces of wood; crates and parts of crates; bundles of paper; broken furniture; rags, cans and rubbish.

The foregoing is not an enumeration of all of the different things found in the deposits. There were introduced in evidence a great variety of things that had been found at different times upon the beaches amongst the general mass of deposits. The number of these things exceed 250 kinds. Included in these and bearing the names and addresses of business houses and concerns in New York City are such things as billheads, business cards and letterheads; paper cartons and labels, bulletins and cancelled checks; hundreds of sale slips and order and charge slips; large bundle of letters to a New York City concern; a number of "examination papers" in a college in New York City; innumerable milk bottle caps with names thereon of one or another dealer in New York City; laundry tickets, theatre tickets, restaurant tickets and menu cards; papers in large bundles; crates and paper boxes, all containing New York City addresses. A bundle of 46 letters, postmarked City of New York, dated in December, all addressed to one family in New York City.

This conglomeration is spread over and upon the beaches from high-water mark to low-water mark, littering the entire beach, and while at different beaches there frequently appears a variety such as more of the wooden things, driftwood and so forth, the general mass appears at all of the beaches affected by the particular deposit. The deposits extend long distances along the shores, sometimes in unbroken lengths of more than twenty miles and at other times is limited to the length of three or four or more of the beach fronts. At times the mass does not stop at high-water mark but is cast by the force of the waves under the boardwalks and into the street beyond. Frequently the depth of the mass exceeds one foot.

When the garbage and refuse are cast upon the beaches they must be speedly removed, especially in summer. The conglomeration of things spoken of and referred to give off offensive odors and when subjected to the sun's rays in-

crease in offensiveness and foul smelling that reach away from the shore to the streets and into the homes of the people. Swarms of flies appear on the mass and feed there. The offensive odors from these deposits cause annoyance and discomfort and nausea. They are unsightly on the beaches. Large proportions of the animal and vegetable matter forming a part of the conglomeration and being in the putrid or decaying condition must be disposed of hurriedly and are buried. Other parts are hauled away. At times it requires fifty or more truck loads to remove one deposit from a single beach. The grease-like matter is removed by rakes. The deposits of garbage and refuse pollute the beaches and produce unhealthful conditions, interfering with and frequently preventing the comfortable and enjoyable use of the beaches and the sea. It is dangerous to leave children unattended on the beach while the deposits are there because of things they may pick up; some of the things found being unmentionable. Broken glass and nails in pieces of wood have been the cause of severe wounds to persons on the beach or in bathing. The appearance and condition of the conglomeration is aptly described by witnesses as "nasty" and "filthy". It is a menace to health and tends to injure business and property values. It injures rental values. They have been made the subject of many complaints as hereafter stated.

During June, July and August, 1929, there were in Asbury Park a considerable increase over the preceding year of cases of external otitis which is a swelling or inflamation of the ear canal and of cases of infection of the middle ear, requiring the drum to be opened, and of sinus affected cases, resulting from bathing in the ocean.

Pure sea water has a high chlorine content and is quite antiseptic. Infection is contrary to the natural conditions of sea water. One or more of the Coast Guard incurred a skin infection from the water which gave them considerable trouble.

(8) Removal and Expense.

Each deposit of garbage and refuse imposes upon the municipalities affected the expense incident to its removal. Men are regularly employed to perform that duty. The cost of cleaning the beaches following such deposits at Bayhead amounted, in 1929, to $3,000; at Belmar, $2,000; at Bradley Beach, for 1928 and 1929, it exceeded $2,500; at Deal, from $1,000 to $1,500 per year; at Allenhurst, $1,000 per year; at Ocean Grove an average of approximately $275 in four years; at Seaside Park, $600 per year; at Seaside Heights, $500 per year; at Spring Lake, $300 per storm, and in 1929, $700 as the expense of one removal; and various sums at the other places, some in excess of those stated.

(9) Water and Fish Nets.

When the garbage and refuse have been cast upon the shores, as stated, it generally occurs that the water along the shore line continues to hold in suspension large quantities of the same kind of material which renders bathing therein undesirable and impracticable until the water and its undertow can carry these things away. The objectionable materials can be seen in the water and furnish the basis for many complaints by visitors and others. Usually the sea clears along the shore in a few days and at times, in a day after, the deposit on the beach.

When the garbage or refuse is cast upon the beaches it frequently occurs that fish pound nets in the vicinity of such beaches are torn by garbage or refuse in the water thrown against them, and in addition to the damage so resulting they become fouled and difficult to handle. The repair of them from the effects of the garbage and refuse costs many thousands of dollars, which must be borne by the owners. The presence of garbage and refuse in the water in the vicinity of the nets injuriously affect the business of fishing by such nets.

(10) Occur, When.

The deposits of garbage and refuse on the beaches occur when the winds are from the east or northeast. A storm or severe blow from either of these directions does and will bring the garbage, and a wind of from twenty to thirty miles an hour does also bring it to and upon the shore; as also does an east or northeast wind of two or three days duration. Sometimes the garbage and refuse are brought in by southeast winds. The heavier deposits occur on some of the beaches four or five times a season, and occur frequently throughout the year, varying in number with the different beaches.

There is no conflict in the testimony as to the foregoing general statement. The sections thereof, numbered respectively, (1) to (10), both inclusive, are made a part of my findings of fact.

(11) Dumping.

Nor is there any dispute as to the fact of the disposal by the City of New York of garbage, street sweeping and rubbish by dumping the same at sea. The defendant admits it does now and has for years since the fall of 1918, dumped these things in the ocean. It produced a statement from its records showing that it has dumped into the ocean during the last six years an average of more than a million and a third cubic yards per year; that the last year, 1929, was above that average and exceeded the amount dumped in either of the three preceding years. Reduced to tons, the disposal by dumping in the ocean during 1929 was approximately 492,000 tons. In the winter months there are less materials dumped than in the summer months. In February 1929 there were 52,000 cubic yards dumped, and in June of that year 192,000 cubic yards. These dumpings are made every day except when the weather conditions prevent. The foregoing section numbered (11), title "Dumping" is made a part of my findings of fact.

(To avoid repetition of statement I also make a part of these findings of fact, the following sections, entitled: History of Dumping, Complaints, Supervisor's Reports, Quantities, Appearance and movement, and Incinerators, numbered, respectively, from 12 to 17 inclusive.)

(12) History of Dumping.

For about twenty years prior to 1918, the City of New York disposed of its garbage and street sweepings by what is known as the "reduction system" and except for a brief period during 1906 did not dispose of these things at sea. Some necessary repairs or alterations in the reduction plant in 1906 made it necessary to dispose of these materials otherwise for a short period, and during that period they went to sea. The by-products from the "reduction system" were disposed of.

In 1918 the reduction plant at Barren Island having been destroyed by fire, occurring in 1917 and the contractor operating the one at Staten Island having failed, the city was confronted with the situation that it had no method for the disposal of its garbage and waste, and accordingly applied to the Supervisor of the Harbor of New York for permission to dispose of these materials at sea. This Supervisor of the Harbor is an officer provided for by the Act of Congress of June 29, 1888 (25 Stat. 209), entitled an "Act to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York by dumping or otherwise and to punish and prevent such offenses". This Act and some amendments thereto are made Sec. 441 *et seq.* of the U. S. Code, 44 Stat. 1072.

Under date of August 8, 1918, Dr. R. S. Copeland, then Health Commissioner of New York, addressed a communication to the Supervisor of the Harbor stating the very serious situation confronting the city because of garbage and said:

> "The only present method we have of getting rid of garbage is to dump it at sea. . . . In order to pro-

tect the health of the citizens of this city it is absolutely essential to get rid of the garbage and without delay. I trust this will meet with your approval. But I want you to understand that we do not contemplate any permanent use of so inadequate a system. It is simply a temporary expedient to bridge over an emergency."

A similar request for permission went to the Supervisor of the Harbor from the Commissioner of Street Cleaning of the city. Because of the conditions thus outlined the Supervisor of the Harbor gave permission for the dumping of garbage at sea and prescribed an area southeast of Scotland Light Ship in which it should be dumped.

Later still, complaints having reached his office from the New Jersey coasts the Supervisor designated three dumping areas, located respectively at distances of eight, twelve and twenty miles southeast of Scotland Light; the eight mile area to be used during the winter months; the twelve mile area in the early spring and late fall months, and the twenty mile area in the summer and later spring and early fall months. The shorter distances were allowed in the seasons mentioned because of the unseaworthiness of the scows in the service in the heavy seas usually prevailing during such seasons of the year and the time consumed in towing them to the dumping places and return in rough weather. The dumping areas are approximately ten, twelve and a half and twenty-two miles, respectively from the shore of New Jersey.

The practice of dumping the materials at sea, begun as an emergency, has continued, but its character as an emergency authorization does not appear to have been altered.

The materials to be dumped are loaded upon scows at designated city docks from wagons and trucks collecting them in the city. These scows are towed by tugs in tows of two or three scows to the area of disposal. Accompanying each of the tug boats is a "dumping inspector" from the office of the Supervisor of the Harbor whose duty it is to see that the dumping is done within the prescribed areas.

He is required to report on each occasion directly to said office the facts as to the scows and the place of the dumping.

(13) Complaints.

I find that complaints have been made and summarize the facts as follows:

Complaints of the condition of the beaches and adjacent waters produced by the deposit of garbage or refuse thereon have been made frequently for years by visitors to the different resorts, by residents of the municipalities and by municipal authorities, and by organizations of citizens having as a purpose the correction of these conditions. Such complaints in different forms and the conditions giving rise to them have been frequently brought to the attention of the defendant, its Mayor and other agents.

In December, 1918, a few months after the dumping at sea began defendant's Mayor requested the Supervisor of the Harbor that he authorize a change in the dumping places so as to shorten the distance to be traveled by the scows. The Supervisor declined this request, and in his letter to the Mayor called attention to conditions produced on the New Jersey shores during the year 1906, when for a short period the defendant had been authorized to dump its garbage at sea, and stated that in view of this experience he should not be called upon to "jeopardize the health of residents and the sanitary condition of the beaches along Long Island and New Jersey coasts by any modification of the conditions as to the disposition of such offensive materials as are present in operation". And he added: "As I have already stated to you in my previous communication, the deposit of this material at the mouth of the harbor is most objectionable from every point of view."

In the report hereafter mentioned, submitted to the Mayor of New York, June 1, 1921, the Committee appointed by him to report on the question of disposal of waste by the City, said amongst other things:

"Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at

the present. It is known that the federal authorities quietly resent if they do not openly object to it, and there is always the possibility of objection from other communities which have in the past claimed that they have been injured by the practice."

In June, 1923, the Mayor of Asbury Park complained to the Mayor of New York of the condition. The reports of the Supervisor of the Harbor in evidence, show that repeatedly since 1920 the question of alternative plans for garbage disposal has been discussed with the city. The defendant's Commissioner of Street Cleaning department and its Corporation Counsel attended a meeting in 1923 of representatives of the organizations already mentioned as formed for the purpose of stopping the pollution of the beaches and stated in effect that the dumping would soon stop.

The several Governors of New Jersey from 1922 to 1929 have been active and earnest in bringing the beach conditions arising from garbage cast thereon to the attention of the Mayor of New York, and have appealed to the Secretary of War for relief. The Secretary of War has directed the Supervisor of the Harbor to bring these conditions to the attention of the City and has urged on the Mayor the "importance of early completion" of the plans for incinerators.

These beach conditions with promises to seek remedies against their continuance have been the subject of platform declaration by one or both of the two major political parties in New Jersey from 1922 to 1929.

Governor Sulzer in 1924 and 1926, Governor Moore in 1927 and Governor Larsen in 1929 discussed the same subject in their annual messages.

It has been the subject of joint resolutions by the legislature in 1927 and 1928 and 1929.

The City of New York, through its Mayor and other responsible agencies, has been informed of these beach conditions and their injurious effect together with the desire

of the people of New Jersey that they cease, and this information has been repeatedly given said city.

(14) Supervisor's Reports.

The Reports of the Supervisor of the Harbor of New York, included in the annual report of the Chief of Engineers for the years 1918 to 1929, inclusive, mention the fact that the defendant's garbage is being disposed of at sea. The report for 1918 states that because of the destruction of the plant at Barren Island "it was necessary to dispose of this objectionable material at sea", and that the point designated for its disposal was fifteen miles southeast of Scotland Light.

In 1919 the report stated that "the practice of disposing of garbage at sea has continued." In 1920 the report states: "About two years ago at the request of the New York City Commissioner of Street Cleaning and the urgent solicitation of the Commissioner of Health the Supervisor authorized the disposal of city garbage at sea as a temporary measure to continue for two or three months only. The practice still continues and there is no prospect of an immediate change." The substance of this statement appears in the reports for the subsequent years.

In a letter dated September 10, 1925, from the Secretary of War, in response to one from the Governor of New Jersey complaining of garbage conditions on the shores of the State, the Secretary disclaimed that any authority to dump garbage emanated from his office but stated that permission had been granted by the Supervisor of the Harbor in New York.

The disposal of its garbage at sea has continued except that in February, 1924, there was put in operation by the City of New York a 300-ton "incinerating" plant, the first plant after the cessation of the "reduction system". In November, 1925, another incinerating plant was put in operation, and since then additional incinerating plants have been put in operation.

(15) Quantities.

The amount of garbage and refuse dumped in 1924 was approximately 1,675,000 cubic yards; and in that year one incinerating plant was in operation. In 1925 the amount was approximately 1,500,000 cubic yards, a second incinerating plant going into operation in November of that year. In 1926 the amount was approximately 1,300,000 cubic yards; in 1927, 1,200,000 cubic yards and in 1928 an increase over the last figure; while in 1929 the amount rose to 1,478,165 cubic yards, though there were in operation nineteen incinerating plants. The amount in tons is obtained by dividing the cubic yards by three. It therefore appears that during 1929 there were 492,721 tons dumped; an average of more than 40,000 tons per month.

The dumping goes on each day except when the weather prevents taking the scows to sea, which latter increases the amount that must be dumped when the scows can go to sea. The daily average exceeds 1,000 tons per day. The daily average over the year's operation does not reflect the conditions as they are because less garbage is dumped in winter than in summer. Thus in February, 1929, there were dumped about 52,000 cubic yards, something over 17,000 tons; while in June of that year there were dumped approximately 192,000 cubic yards, or 64,000 tons; a daily average of more than 2,000 tons.

(16) Appearance and Movement.

When the dumping areas is reached, the side gates of the scow are opened upon signal from the tugs, and the contents slide to the water. These are intermixtures of garbage, street sweepings and rubbish. When they slide from the scow, large portions sink, but other large portions float on the surface or are held in suspension by the water. The facts confirm the statement made by a Commission appointed by the Mayor of New York in June, 1907, hereto-

fore mentioned, that "unfortunately the less harmful material sinks and the foulest floats." These floating and the suspended materials spread in a mass extending at times six or more miles in length, of varying widths, and interspersed with lanes or "slicks", the latter so-called because of grease particles on the surface. Such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement. The mass moves at times westward and northward or towards the shores of New Jersey or Long Island, according to the direction and velocity of the wind.

The plaintiff caused an investigation to be made at the dumping places in the summer of 1929, of the conditions there when the scows discharged their contents. The persons making these investigations made more than thirty different trips to the dumping places, and on at least fourteen of them were close by when the scows dumped their contents, and they observed the same.

The defendant sent to the dumping areas on three occasions in February and March, 1930, persons to examine and report upon conditions. The Supervisor of the Harbor sent an agent to these areas to investigate the floating garbage in February, March and April of 1929, and this agent made six trips. They all concur in the general conclusion, and I find it to be a fact that the mass spreads out on the surface of the water, gradually breaking up into smaller areas and moving for indefinite periods with the wind, some of the materials being on the surface and some in suspension. The Supervisor's agent, instructed to follow the floating mass for 24 hours, found on one occasion that the garbage went about fourteen miles in twelve hours, the drift being toward the Narrows; on another occasion the drift being westward under a variable east wind from three to thirty-five miles, went seventeen miles in 24 hours, and was about six miles off the New Jersey shore when he left.

A large number of fishermen whose business is lobster fishing, taking them for miles out from the shore, were examined as witnesses. Many of these men go out every day and have followed their avocation for many years. They have frequently seen the dumping and the masses of floating garbage that followed. Their boats pass through or around such masses as they go or come. The mass is so thick at times that boats cannot go through it. They have seen these floating areas of garbage and refuse at various points between the dumping places and the New Jersey shore, and some have followed it from the dumping place to where it went ashore.

Members of the Coast Guard from different stations on the New Jersey shore have frequently seen floating areas of garbage and refuse near the shore and at some distances from the shore, the area varying in size from several acres to narrow strips. Parts or areas of these masses of garbage or refuse in suspension appear frequently, and are seen at short distances off shore, by persons on the shore, and some are encountered by persons in pleasure boats or fishing boats at divers places off shore.

While the parties sent to the dumping places by plaintiff were there, a photographer among them took a number of photographs showing the conditions of the garbage on the water, which were introduced in evidence. A number of the fishermen identified conditions which they had witnessed as being similar to those shown by some of these exhibits. The parties sent out as stated by plaintiff cast into the mass on several occasions a large number of sealed bottles containing self-addressed and stamped cards, with the request that any finder return them by mail. About twenty-five per cent of these cards came back to the parties by mail from persons along the New Jersey shore and Long Island shore, and some from farther north.

During fourteen times these persons went out in May, June and July of 1929, they made a list of things seen in the water after the scows were dumped. This list contains

the identical kinds of materials that are heretofore stated to constitute the deposits on shore: fruits and fruit skins; vegetables, electric light bulbs, papers and rags, wooden boxes, crating, pasteboard boxes, dead animals and many other things. The mass falling from the scows forms piles a foot clear of water. Gradually displacement takes place, and the heavier stuffs, finding their way through the floating mass, sink.

The odors arising from the mass are offensive and nauseating. The Supervisor of the Harbor of New York, in his report to the Chief of Engineers in 1918, said: "Garbage deposited at sea, no matter what the distance from shore, is apt to wash up on the beaches." In each of his subsequent reports it is said in substance: "Experience indicates that garbage at sea at no matter what distance is liable to wash up on the beaches."

I find that large parts of these floating and submerged areas of garbage and refuse, dumped by the defendant, are driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water, hereinbefore described, and that the winds in such cases come from the east or the northeast, and sometimes from the southeast, as has been heretofore found.

(17) Incinerators.

As hereinbefore stated, the method of garbage disposal in use by defendant prior to October, 1918, was what was known as the "Reduction System", by which the by-products were conserved. It began the disposal of garbage and refuse at sea in October, 1918 and has continued the same. In the meantime, however, it has built a number of incinerators as will later appear.

In 1920, a Committee was appointed by the Mayor of New York to report upon the subject of "Collection and Disposal of City Waste." This committee was composed of the heads of departments and officials, including the

Health Commissioner of the State, who had requested permission for the disposal by the city of its garbage at sea, as hereinbefore stated. The report to the defendant's Mayor, dated June 1, 1921, was introduced in evidence. Asserting that "There is perhaps no more important or difficult task confronting any municipality than this one of waste removal," the Report made estimates based upon the data before the committee that in the Boroughs of Manhattan, the Bronx, and Brooklyn alone, the Street Cleaning Department in 1920 disposed of about ten million cubic yards of "ashes, rubbish, street sweepings, garbage and dead animals", or approximately 270,000 tons of rubbish, 440,000 tons of garbage and 300,000 tons of street sweepings." And further estimated that the number of dead animals, aside from "large animals" amounted in 1920 to 217,600 small animals, such as sheep, calves, hogs, cats and dogs.

As to the method of disposal of garbage they reported: "The greatest objection to the present system of disposing of waste materials is in connection with the method now being used for getting rid of garbage, which is both unsanitary and uneconomical. For some years the disposal of garbage not only did not cost the city anything, but as a matter of fact returned a small yearly profit. . . . Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal."

The Committee made no final recommendation for the disposition of garbage, as to the method of incineration or reduction, pending further investigation.

Long prior to the foregoing report, which was made June 1, 1921, a report had been made by a Commission consisting of distinguished consulting engineers, appointed by Mayor McClellan of New York which reported to him on December 31, 1907 upon the question of street cleaning and waste disposal. This report is known as the Parsons, Henry and Whinnery Report. This Committee reported adversely to dumping garbage and refuse at sea, among other things saying: "All of the refuse collections could be dumped into the Atlantic ocean, but unfortunately the least harmful material sinks and the foulest floats, so that much of the floatable mass will be scattered along beaches through the action of current and wind. This fouling of beaches creates a nuisance that the public should not be asked to tolerate."

Mr. Samuel A. Greeley, an hydraulic and sanitary engineer of recognized experience and ability, with practical knowledge of the methods of the disposal of garbage, condemned the method of disposing of garbage and refuse at sea for very much the same reasons given by the Committee above mentioned in their report of 1921. He gave as his opinion that either incineration or the "Reduction System" is good.

Considerable portions of its garbage and refuse collected by the defendant has been and is being disposed of by incinerators constructed by the defendant. The first of these was put in operation in 1924, some five years after the dumping at sea began. In December, 1929, the defandant had in operation three incinerators in the Borough of Manhattan, none in the Bronx, nine in Queens, five in Brooklyn and three in Richmond.

The Department of Sanitation in New York City is a newly created one under the law and went into effect on December 1, 1929. In took over the jurisdiction formerly exercised by the Department of Street cleaning and some other agencies of the City. On December 23, 1929, the new Department of Sanitation presented to the Mayor of the City a program for increasing the number of incinerators

in the five boroughs as follows: Five 500-ton plants in Manhattan; four 500-ton plants in the Bronx; five 500-ton plants in Queens and five 500-ton plants in Brooklyn, and the reconstruction of two plants in Richmond.

The City now has the power of condemnation, which it did not have prior to 1929. It does not appear what if any action has been taken by the Mayor or city authorities upon the program presented by the new Department of Sanitation.

The evidence does not show the cause of the apparent delay by the defendant in adopting and putting into operation the incinerating system. It was in 1924, some five years after the defendant began dumping at sea that its first incinerator was put into operation, and during the next succeeding five years others were built. Those constructed and in use fall far short of taking care of the garbage and refuse situation. A reason offered for the delay is that the City did not have the power of condemnation and could not override objections in localities to the operation of incinerators therein. This power was acquired in 1929 and there is no evidence explaining why it was not acquired sooner.

I conclude that the method of disposing of garbage and refuse by dumping the same at sea is not an approved or a good system and that disposition of such material by incineration or the "Reduction system" is a proper way to dispose of the same. I further conclude that the delay of defendant in adopting a proper method of disposal has been unreasonably long.

SOME ISSUES OF FACT.

The defendant contends, however, that the garbage and refuse on the beaches result from the disposals, first by steamships, and second, by scows of private contractors and by some others to be named.

(1) Steamships: It is to be observed that the lanes for European and foreign vessels to and from New York pass to the north and east of the designated dumping areas; that is to say, these dumping areas are between the lanes and the shores.

(a) There is evidence that some coastwise and other vessels discharge garbage or refuse into the ocean. Vessels out of New York go southward or come from southern ports to New York, passing the New Jersey coast at a distance of from three to eight miles and their general routes lie between the dumping places of the City and the shores.

The evidence as to the number of such vessels is that produced by the defendant to the effect that in December, 1928 and January of 1929 there were 1227 vessels entering the Port of New York from southern ports, and during July and August of 1929 the number was 1892. That the number clearing from New York for southern ports in December, 1928 and January, 1929, was 1173; and in July and August, 1929 was 1192. Whether freight or passenger vessels, or the relative number of each does not appear, but if it be assumed that the vessels in and out of New York for the four months mentioned represent a fair average of the number for each month of the year and that the average per day is the same for the different years the result would show that approximately thirty entered from southern ports and twenty departed from New York for southern ports each day, the difference in number in those coming in and those going out being accounted for by the fact that some entering New York from southern ports clear therefrom for other than southern ports.

A witness introduced by the defendant, being one of the three sent out by the defendant to examine the conditions at the dumping places, and a pilot of experience, made an estimate to the effect that there were twenty vessels a day going and coming from southern ports to New York.

The direction of the vessels, whether going to or clearing from New York affects the amount and kind of material

they discharge. Thus vessels coming from southern ports discharge their garbage and refuse about as fast as it is produced, or shortly after leaving their last port of call, except vessels coming from nearby places, such as Philadelphia to New York, which are supposed to discharge their garbage and refuse after leaving Delaware breakwater and there is no reason to assume that the vessels from southern ports allow these things to accumulate until they arrive off the New Jersey coast.

(b) On the other hand the vessels in New York harbor which provide for their crews while in port and which do not provide for the disposal of garbage and refuse while in port (as some vessels and lines do arrange) have to get rid of the same after getting out of the harbor. The sweepings from the cargo, the cleanings from the ships, including dunnage and such crates and boxes as may have accumulated and other materials are piled upon the deck together with garbage preparatory to casting the same overboard after the vessels have gotten under way. There is evidence that some of the vessels and a majority of the lines operating out of New York southward do not accumulate garbage or other refuse matter but make arrangements for its disposal while in port. Crews of some vessels are maintained on board and crews of others are not maintained while in port. There is evidence that some vessels southbound begin the disposition of their accumulated garbage, refuse and rubbish soon after leaving the point southwest of Scotland Light and continue to discharge as they proceed. There is an estimated amount by two or three witnesses for the defendant, being the same witnesses who went out to make the investigation at the dumping areas for the defendant, that forty to fifty tons are discharged from some of these vessels leaving New York. The amount of the garbage that is intermixed with the other materials is not stated or estimated.

(c) In 1924 owing to complaints to his office of garbage reaching the shore, the Supervisor of the Harbor sent re-

quests to all shipping companies that their vessels refrain from discharging garbage within twenty-five miles of Ambrose Lightship, and received from many of them assurance of their cooperation.

(d) There is evidence by one of the witnesses already mentioned for the defendant that vessels, sometimes as many as fifty, coming to New York, are held by fog or heavy seas at anchor off the lightship for a day or two, and while there throw overboard their accumulated garbage and refuse material.

There is testimony by a special agent of the defendant's department of sanitation, giving the location of various docks of scows of private contractors in the borough of Manhattan, and that on several occasions in March, 1930, he visited some of these dumps and saw wagons and trucks dumping into these scows a variety of materials; and two other witnesses testified to similar conditions.

There is no evidence that any garbage or refuse from these places is dumped at sea. There is no evidence that scows receiving the materials mentioned by the three witnesses in March, 1930, dumped the same at sea, or where they disposed of it.

On the other hand there is testimony from officers of ships operating along the coast that a few bushels of garbage is cast overboard from vessels coming out of New York and largely taken up by gulls; and some members of the Coast Guard testified that they have seen ships cast off garbage in small quantities, these expressing the opinion that the quantities are too small to account for the areas floating or in suspension in the water.

(e) There is evidence that a foreign steamship was seen to discharge garbage on an occasion in or near the waters of New York Harbor, and a photograph of the vessel on that occasion was made an exhibit.

(f) There is evidence that a witness had taken on his vessel a cargo of condemned onions and discharged the

same at sea twenty-five miles southeast of Scotland Lightship.

(f) There is evidence that permits had been issued by the Supervisor of the Harbor to five different concerns to dump mud off shore at points designated as three mile limit southeast of Scotland Lightship, and to three others to dump "cellar dirt" at the four mile limit; and to several to dump "cellar dirt intermixed with rock" at the six mile limit. These concerns dumped the materials mentioned at the various places. Some other materials are permitted to be dumped at the eight mile limit.

(h) From time to time and infrequently cargoes of foodstuffs, vegetables and fruits, condemned by the Board of Health authorities, are disposed of at sea by outbound vessels under permits, the amounts being relatively small. Such deposits are beyond the area used by the defendant. A system of patrol boats and of inspection is maintained by the Supervisor of the Harbor to prevent depositing materials at other than the stated areas.

(i) Scows from the Brooklyn Navy Yard dump materials at the dumping areas used by the defendant, their contents being generally rubbish and refuse with a small amount of garbage.

(g) Another source alleged by the defendant in its amended answer "for a Second defense" is that insufficiently treated and unsanitary sewage from the City of Long Branch and of Asbury Park has been for a number of years discharged into the ocean at short distances from each of these cities.

As to the Long Branch sewer, the evidence consists of a plan of the sewage system and some evidence that complaints were at one time made to the Department of Health which investigated the same; and that the matters were satisfactorily adjusted.

As to Asbury Park sewage, there is evidence that in March, 1930, witnesses for the defendant made an examination of that system and at the outlet of the sewer about

1,000 feet off shore found emerging from the sewer outlet fecal, and vegetable matter and fruit peelings. This phase was explained in rebuttal by the Superintendent of the Water and Sewers in that city, who described the system used, that the sewage collected by the regular intercepting system and no fecal matter goes out. He explained that about once a year, and in winter as a convenient time, there is an opening of the "blow-off gates to relieve the sludge tank of its load", and having properly cleaned and washed the tank, the valve is again closed, and that during the period of this operation materials may go into the outlet that cannot go there when the valve is closed; that this kind of cleaning process was in operation on March 19, 1930, the date of said visits by said witnesses.

Defendant also introduced a bill of complaint exhibited by the Department of Health of New Jersey against Asbury Park in Chancery in New Jersey, praying an injunction restraining that city from discharging into the ocean inadequately treated sewage from the "municipal sewage treatment works", which discharge, it is alleged, is due to insufficient capacity and design of said works. These works were constructed in 1909. This bill was filed in the summer of 1930, under a proceeding authorized by the statutes of New Jersey.

I have set forth in perhaps unnecessary detail some of the evidence offered by the defendant and have done so (1) to show the latitude extended in adducing proof when much of it under the general denials of the original answer would in strictness be inadmissible. It was generally heard without objection. And (2) to show something of the indefiniteness of the testimony itself.

Manifestly the proof offered by the defendant leaves much to surmise and speculation. Testimony that some vessels discharged garbage and refuse after clearing from New York falls short of establishing a custom by other vessels. Proof that employes of the defendant saw garbage and refuse dumped into scows of private contractors

in March, 1930, has small probative force towards establishing what occurred in 1929 and prior years.

There is proof that some vessels discharge garbage and refuse and that scows with permits to dump cellar dirt frequently have with it pieces of wood in more or less quantities, besides other proof referred to.

Giving to the evidence due consideration, I think it should be concluded that whatever garbage and refuse reaches the plaintiff's shores from coastwise and other vessels and other causes, and other dumpings than those of the defendant, are negligible in comparison with that constantly being dumped by the defendant, and frequently carried by winds and waves from the dumping places to and upon plaintiff's shores, as hereinbefore stated.

SOME QUESTIONS OF LAW.

Some questions of law arising between the parties are as follows:

1. The plaintiff's contention that defendant dumps its garbage in water over soil belonging to plaintiff, that is to say, in the waters of its marginal sea.

2. Effect of permits issued by the Supervisor of the Harbor of New York to defendant.

3. The question of nuisance.

4. Prescription.

5. Degree of proof.

6. Jurisdiction.

1. Trespass.

The plaintiff contends that the dumping of garbage by defendant is upon its property and therefore constitutes trespass.

As the farthest place of the dumping is more than twenty miles from the New Jersey shore, the claim that the "marginal sea" of the State extends to and beyond that point is at least interesting. It is, of course, true that within its territorial limits property rights are to be measured by the rules and decisions of the courts of the State, and that these will be followed by this Court (*St. Anthony Falls Co.* v. *Board,* 168 U. S. 349, 362; *Baum* v. *Keohm,* 94 U. S. 324, 338; *Rundell* v. *D. & R. Canal,* 20 Howard 80 and 93). But the plaintiff insists that the limit of its marginal sea is not to be measured from the low water line on its shore but from a line drawn between two headlands projecting the one at Montauk Point, New York, and the other at Cape May, New Jersey, and seeks to apply the rule of the common law for determining whether the head or arm of the sea was within the jurisdiction of a given county or outside of it and therefore under the jurisdiction of the sovereign alone.

This method for determining the county's jurisdiction was that the distance between the *terrae fauces* should be no greater than to render it possible for a person to discern with the naked eye what was being done on the opposite shore. Plaintiff argues that in this country "we thus determine the jurisdiction of states rather than of counties".

This Court said in *Manchester* v. *Massachusetts* (139 U. S. 240, 263), that "there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a means of determining jurisdiction of states." The Court was there considering a contention that the jurisdiction of the State as between it and the United States should be confined to the border of the counties and that the counties should be defined according to the customary English usage, by the application of the rule as to headlands. This Court said (page 264): "The extent of the territorial jurisdiction of Massachusetts over the sea

adjacent to its coasts is that of an independent nation and except in so far as any right of control over this territory has been granted to the United States this control remains with the state."

In *Martin* v. *Waddell* (16 Pet. 307, 410), language from which is applicable to New Jersey, this Court said: "For when the Revolution took place the people of each state became themselves sovereign and in that character hold the absolute right to all their navigable waters and the shores to them for their own common use, subject only to the right since surrendered by the Constitution to the general Government." To the same effect see *Illinois Central Railroad Company* v. *Illinois* (146 U. S. 387).

At the time the plaintiff became a state, succeeding to the rights of English sovereign, the common law rule was that the territorial limit extended "only to such distance as is capable of command from the shore of the range of a cannon, which for the purposes of certainty is regarded as one marine league, although for the purposes of self-protection in times of war and for the prevention of fraud upon its revenues each nation is accustomed to exercise authority beyond this limit. (Gould on Waters, 3; Angell on Tidewaters, 2.)

In *Manchester* v. *Massachusetts, supra,* this Court said (p. 258): "We think it must be regarded as established that as between nations the minimum limit of territorial jurisdiction of a nation over tide water is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth are without this limit, and that included in this territorial jurisdiction is the right of control over fisheries. . . . The open sea within this limit is, of course, subject to common law rights of navigation and the government for the purpose of self-protection in times of war or for the protection from fraud on its revenues, exercises authority beyond this limit."

In *Cunard Steamship Company* v. *Mellon* (262 U. S. 100, 122), this Court said: "It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land area under its dominion and control, the ports, harbors, bays and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league or three geographical miles."

The view of Chancellor Kent (1 Kent Com. 30) and of other writers on international law cited by complainant, that our Government could reasonably assume the control over waters of our coast "though included within lines stretching from quite distant headlands", as for instance from Nantucket to Mantauk Point, and from that point to capes of Delaware, and from Florida to the Mississippi River, do not serve to increase the territorial limits of a state. The headlands mentioned are not the *"terrae fauces"* of the common law, which involved points within the territory of one sovereign. The assertion by the general Government of power conferred by the States does not operate to increase the territorial limits of a State. The treaty making power and that of providing for the common defense, as well as the power applicable to commerce and navigation admit of the assertion of claims by the United States no longer open to the several States. (*United States* v. *Rauscher,* 119 U. S. 407, 418; *Gibbons* v. *Ogden,* 9 Wheat. 1; *Maiorano* v. *Baltimore Road,* 213 U. S. 268, 272.)

As a practical expression by the Federal Government on this question there may be mentioned the comparatively recent treaty with Great Britain relative to infractions of the Prohibition Laws and fixing a limit, sometimes called the "Twelve Mile Limit", Article I of which provides:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards

and measured from law water mark constitutes the proper limit of territorial waters". (See *Ford* v. *United States*, 273 U. S. 593, 607.)

The State of New Jersey succeeded to rights of the English crown. (See *Martin* v. *Waddell*, *supra*, citing *Arnold* v. *Munday*, 6 N. J. L. 1).

In its first constitution, adopted July 2, 1776, Art. XXII, it is provided: "That the common law of England as well as so much of the statute laws as have been heretofore practiced in this colony shall still remain in force until they shall be altered by future law of the legislature". (1 Comp. Stat. XXXII).

And in its present constitution, it is provided that the common law and statute law "now in force" and not repugnant to the constitution shall remain in force until altered or repealed. (I Comp. Stat. XLVII).

The Statute of New Jersey defining the boundary of counties provides (109 Sec. I), the "territorial limits of each county of this State fronting upon the sea coast be and the same are hereby extended to a line parallel with the ocean shore line of said counties and extend easterly three nautical miles therefrom and the division lines between said counties as they now exist be and the same hereby are extended from the several points where they now reach the sea in course due east until they severally reach said outer line of said counties as hereby established." (2 Comp. Stat., p. 1703, Public Laws of 1906, p. 542).

Reference has already been made to the Act requiring licenses for pound net fishing. Another Act (2 Comp. Stat, Sec. 123, p. 252) makes it unlawful for any person to take with "purse or shirred nets" certain fish in any county within the jurisdiction of this State, including a county on the Atlantic ocean within three nautical miles of the coast line."

In *Gough* v. *Bell* (22 N. J. L. 411, 455), it is said: "This title, which by the common law of England is vested in the King, upon the Revolution became vested in the people of

the State. . . . In this State the rule of the common law as to the limit of its rights remains unaltered."

I think the established rule of the common law should be accepted in determining the territorial limits of New Jersey in the soil under water and that its claim that the dumping of garbage is upon its property is not sustained.

As before stated, large areas of garbage and refuse floating upon or held in suspension by the water, which have been dumped by defendant's scows, are driven and carried by wind and water to and upon the shores of plaintiff and other portions or areas thereof are held for indefinite periods in the waters above soil owned by plaintiff and do great injury to fishing and bathing in such waters.

2. Permits.

In its amended answer the defendant alleges "for a first defense" that it has, for many years last past dumped the garbage and some refuse collected by it in the Atlantic ocean, under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said Supervisor under the authority conferred on him by the Act of June 29, 1888" (29 Stat. 209, as amended; Secs. 441, 443, 449 and 451 U. S. Code) "at points eight, twelve and twenty miles southeast of Scotland Light and about ten, twelve and a half and twenty-two miles distant, respectively, from the New Jersey shore (being clearly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States" and adds that "such dumping occurring at these points this Court has no authority to enjoin said City . . . from said dumping of garbage and refuse".

The plaintiff insists that there is no evidence of any permits.

It is a fact that no written permit was introduced in evidence but this is not to say that there is no evidence of permits.

A witness introduced by defendant and afterwards by the plaintiff in rebuttal was Captain Anderson, detailed under the provisions of the Act of June 29, 1888, to perform the duties of Supervisor of the Harbor of New York. Captain Anderson, having made a general statement relative to the duties of his office under the Act was asked:

"Q. Permits have been issued by your office to the city of New York to dispose of garbage and refuse material at sea?

"A. They have.

"Q. Will you explain for our information as well as for the record just how these permits are issued, the procedure so that we may understand for the first time how that is done?

"A. In issuing these permits we have dealt directly with the old department of street cleaning, which is now a division of the Department of Sanitation. They have to apply on a printed form for permission to move and dispose of whatever class of material they may have. We have certain dumping grounds that are customarily used and if their request meets the approval of the office the permission is granted and the permit is issued. This permit is good for only a limited number of days.

"Q. And as the barges and tows proceed to sea under permit is there some representative of your office stationed in the upper and lower Bay to inspect or collect this permit?

"A. On these two boats, towing loads of that description we have an inspector, called a dumping inspector, whose job it is to see that the dumping does not take place short of the designated dumping ground. Also we have on duty patrol boats from my office which are customarily stationed in the vicinity of the Narrows and around Sandy Hook and a little outside and these boats inspect outward and inbound tows and make appropriate notation upon their permit, which they collect." The statute contemplates that they will be collected.

This witness further explained that the officers on the patrol boats noted the time of passing and returning by the tows and these notations "are subsequently checked up in my office to see whether the lapsed time would permit them to go to designated dumping ground."

This officer had testified, as stated, without objection, that permits were issued to the defendant. In addition, the plaintiff has shown by repeated statements in the reports of the Supervisor made a part of the annual reports of the Chief of Engineers for the years 1918 to 1929, inclusive, introduced in evidence, that the Supervisor had given permission to the defendant to dispose of garbage and refuse at designated places, and had also shown by the letter of the Secretary of War to the Governor of the State that the "permission" was given by the Supervisor of the Harbor and not by the office of the Secretary of War to dump the garbage in an "emergency"; and further by the Supervisor's statement to the Mayor of the City when the latter requested a change in the designated area.

In addition to these it affirmatively appears in evidence not only that this officer designated the place where the dumping could be done but there went from his office with each tug towing the scows a "deputy inspector" to see to it that the dumping actually took place at the designated places. The established fact is that the defendant had the Supervisor's authority to dump the materials, whatever that authority may amount to, and would seem to make unnecessary the production of one or all of the "permits", which in the ordinary practice of the Supervisor's office, would amount, in ten or twelve years, to probably a thousand or more. I find as a fact that the dumping was by permission of the Supervisor of the Harbor.

The Act of 1888, (U. S. Code, Secs. 441 *et seq.* 44 Stat. 1072) was entitled "An Act to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses."

This Act, amended in 1898 (U. S. Code, Sec. 443), provided that a line officer of the Navy shall be designated by the President as Supervisor of the Harbor "to Act under the direction of the Secretary of War in enforcing" its provisions. Depositing of certain kinds of materials in the tidal waters of New York or its adjacent tributaries or in those of Long Island Sound "within the limit which shall be prescribed by the Supervisor of the Harbor" are strictly forbidden. One section provided for a permit defining the precise limits within which the discharge of the scows may be made.

Material parts of the Act of 1888, and the amendment of 1898, are as follows: Section 441 and 443 U. S. Code—

> Title 33. Secs. 441. *Deposit of refuse in New York Harbor and adjacent waters prohibited; penalty.*—The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by a fine or imprisonment, or both, such fine to be not less than 250 nor more than $2,500, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor. (June 29, 1888, c. 496, 1, 25 Stat. 209.)
>
> Sec. 443. *Permit for dumping; penalty for taking or towing boat or scow without permit.*—In all cases

of receiving on board of any scows or boats such forbidden matter or substance as described in section 441 of this chapter, the owner or master, or person acting in such capacity on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, shall apply for and obtain from the supervisor of the harbor appointed, as provided in section 451 of this chapter, a permit defining the precise limits within which the discharge of such scows or boats may be made; and it shall not be lawful for the owner or master, or person acting in such capacity, of any tug or towboat to tow or move any scow or boat so loaded with such forbidden matter until such permit shall have been obtained; and every person violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $1,000 nor less than $500, and in addition thereto the master of any tug or towboat so offending shall have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. (May 28, 1908, c. 212, 8, 35 Stat. 426.)

In *United States* v. *Sadie* (41 Fed. 396) Judge Lacombe speaking of this Act of 1888 says (p. 398): "The bodies of water referred to are (a) the Harbor of New York; (b) waters adjacent to the Harbor of New York; (c) waters tributary to the Harbor of New York; (d) Long Island Sound, and as to each of these bodies of water there is a restriction of application of the Act to such waters only as are tidal."

In the present inquiry only the first two of these descriptions can apply: the Harbor and waters adjacent to the Harbor of New York.

The Act contemplated that the Supervisor prescribe certain limits but there is no evidence in this case as to what limits were prescribed. In *City* v. *Leland* (45 Fed. 380, 381), there is reference to certain prescribed limits.

A construction of the Act of 1888, as amended, becomes important. The defendant relies upon the "permit" or

the permission granted by the Supervisor of the Harbor; who has no authority other than that which the Act confers. It may be noted in this conection that this Act is not affected by the Rivers and Harbors Act of March 3, 1899 (U. S. Code, Title 33, Section 407). The latter is a general Act and as was observed by Judge Thatcher in "The Albania" (30 Fed. (2) 727) Sec. 441, *et seq.* of the Code (the Act of 1888) is a special Act applied to New York Harbor and vicinity and it may be repeated in this connection that the Secretary of War in a communication to the Governor of New Jersey stated that the dumping by New York City was through permission of the Supervisor of the Harbor and not by the Secretary. But the purport of the Act of 1888, as was that of the general Rivers and Harbors Act of 1899, is referable to the power of Congress to legislate for the protection of navigation.

There can be no doubt that the dumping was not within the limits of Harbor of New York, as these limits are spoken of in *United States* v. *Newark Meadows Improvement Company* (173 Fed. 426, 428), as being "within a line from Navesink Lighthouse to Scotland Light thence to Whistling Buoy in Gedneny's Channel and thence to Rockaway Point prescribed by the Secretary of the Treasury as the limits of the waters of the Harbor of New York," pursuant to the Act of February 2, 1895, (28 Stat. 672). It was done at eight, twelve and twenty miles, according to the season of the year, southeast by east from Scotland Light, one of the points in the foregoing description.

In *United States* v. *Various Tugs and Scows* (225 Fed. 505), where it appeared that permits had been issued, it was said by Judge Hand (p. 507): "It seems to me that a permit to dump no less than four miles east by southeast of Scotland Light Ship excludes by implication dumping within New York Harbor and its adjacent and tributary waters inside of that point and thus defines the precise limit." He added that even though the limits prescribed by the Supervisor are beyond a marine league from the shore any other interpretation of the national power would

render the Government impotent to protect the harbor and adjacent channel and waters. In order to sustain a conviction under the Act it was held in *Warner Quinlan* v. *United States* (273 Fed. 503), to be necessary for the evidence to show that the Supervisor had prescribed such limits and that the defendant had placed such materials within such limits.

If the limits of the adjacent waters be taken as prescribed by the designation of the places by which dumping was allowable (*U. S.* v. *Various Tugs and Scows, supra*), it is manifest from the distance given that the limits are in excess of "one marine league from said shore" to use the words of the amended answer; but it is difficult to understand how this fact affords any defense in this case. If the defendant did not dump the materials nearer than the designated areas the Supervisor's permission would afford protection against penalties of the Act. But can it be said that these permits serve as a defense against the claim of others whose rights have been invaded?

The purpose of the Act is to protect navigation with reference to New York harbor. The authority of the Federal Government does not extend beyond the requirements of navigation. (*Wisconsin* v. *Illinois*, 278 U. S. 367-415.)

In *Cummings* v. *Chicago* (188 U. S. 410, 431), it was said with reference to Section 10 of the Rivers and Harbors Act of 1899, that its effect "reasonably interpreted is to make the erection of a structure in a navigable river within the limits of a state depend upon the concurrent and joint assent of both national government and the state government. . . . Without such assent the structure can not be erected by them." (*United States* v. *Bellingham Bay Boom Company*, 176 U. S. 211).

In *Port of Seattle* v. *Oregon and Washington Road Company* (255 U. S. 55, 63), it is said: "The right of the use of the navigable waters within the several states is limited to the control thereof for purpose of navigation."

And in *United States* v. *River Range Improvement Company* (269 U. S. 411, 419), this Court says: "While Con-

gress in the exercise of this power may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution of the United States (*United States* v. *Chandler-Dunbar Company,* 229 U. S. 62), it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no relation or substantial relation to the control of navigation or appropriate to that end." (See *Wisconsin* v. *Illinois,* 278 U. S. 367, 415.)

The authority conferred by the Act of 1888 upon the Supervisor was not as general as that found in the Rivers and Harbors Act, nor was it an arbitrary power. So far as the defendant's acts are concerned his authority was only permissive. The title of the original Act (that of 1888) shows its purpose was to protect the Harbor of New York. When the powers of the Supervisor are limited to that purpose they do not purport to extend to a general authorization to regulate the dumping of garbage outside of the waters specified in the Act.

The powers which the Suprevisor has under the Statute and the effect to be given the permits authorized to be issued are to be strictly construed, because of the effect of the dumping upon the rights of others. "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property franchises or privileges in which the government or the public has an interest. . . . Whatever is not unequivocably granted is withheld; nothing passes by mere implication". *Coosa Mining Co.* v. *So. Carolina,* 144 U. S. 550, 562; *Fertilized Co.* v. *Hyde Park,* 97 U. S. 659, 666.

In order to accord to the act full scope as a shield for protection, it is not necessary to make of it also a sword of offense.

Nor does the fact that the defendant is a municipal corporation afford immunity from the results of its own action. It was said by the *Massachusetts Court in Haskell* v. *New Bedford* (108 Mass. 208, 214): "The owner of any lands bordering upon the sea may lawfully throw refuse

matters into it provided he does not create a nuisance to others. But it by no means follows that either the city or any private person has the right to deposit filth upon the seashore in such quantities as to create a nuisance to health or navigation. (See *Brayton* v. *Fall River*, 113 Mass. 218, 230). This case quotes and approves *Franklyn Wharf* v. *Portland* (57 Me. 446, 457), to the effect that "The right of defendant to construct an outfall for their sewer in the sea does not include the right to create a nuisance, public or private."

In *Noonan* v. *City of Albany* (79 N. Y. 476, cited in *Huffmire* v. *Brooklyn*, 162 N. Y. 584, 590), it is said: "A municipal corporation has no greater right than an individual to collect the surface water from the land or streets into artificial channels and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining a nuisance."

In *Block* v. *Maryland* (149 Md. 39), the city was enjoined from the commission of a nuisance notwithstanding it claimed that it was authorized by statute to make a contract and that in the performance of that contract a nuisance was created.

My conclusion is that the Act of 1888, as amended, furnishes no defense to the defendant, and that compliance with permits from the Supervisor of the Harbor acting under the provisions of that Act does not furnish a defense nor relieve it from the effect of a public nuisance resulting from or created by its action.

3. Nuisance

There is no doubt (the amended answer admits) that the defendant for years past, at least since October, 1918, has been dumping large quantities of garbage and refuse at sea, and principally in places designated by the Supervisor of the Harbor of New York. I use the word "principally" because there is evidence that sometimes through accident or the occurring of something unusual, a few scows have dumped their loads nearer to the shore than the appointed

places. There is also evidence uncontradicted, and I find the fact to be that some scows have left upon them considerable quantities of garbage or refuse after their gates have been thrown open to release the contents and these remnants are cast off by the men in charge as the scows are being taken back from the dumping area. The general practice continues, more materials were dumped in 1929 than in the preceding year.

As already stated, the conditions on the plaintiff's shores and adjacent waters produced by garbage and other objectionable materials alleged in the bill are proved by uncontradicted evidence. A summary of the facts found may be stated as follows: Along the shores are many summer resorts which serve to furnish recreation, pleasure and rest to people. Their beaches when unaffected by the bad conditions mentioned are pleasure grounds for thousands of visitors. A large number of people living in and doing business in these municipalities are dependent for their livelihood upon the resorts and the preservation of their recreational advantages. The summer resorts along these shores constitute one of the plaintiff's most valuable industries and they suffer frequently in annoyance and expense from deposits of the materials mentioned. The expense of the removal of garbage and other materials falls upon these municipalities and individuals, and this expense amounts annually to large sums. Their disposition as soon as can be after being cast upon the shore is imperative. Foul smelling and repellent as they generally are when first stranded, they become more so as soon as they are subjected to the rays of the sun. They attract swarms of flies. The odors create nausea, and sometimes reach into homes. The deposits interfere with, and until removed frequently prevent, the use and enjoyment of the beaches for the purposes to which the latter are adapted and for the comfortable and enjoyable use of which people visit them. They cause many complaints from and disappointments to visitors to the several resorts for recreation and health, as well as from those whose business depends upon

the attendance of visitors. Many visitors leave the resorts because they cannot use the beaches when littered or secure the surf bathing when the waters adjacent hold garbage and refuse in suspension. The shores below high water mark and the soil under the adjacent waters for at least three nautical miles belong to plaintiff, and their chief value is in the fisheries and the fact that they can and do afford the attractions pertaining to summer resorts which fisheries and attractions are seriously interfered with by the deposits in question.

Along with and at times of the deposits there frequently come broken bottles and pieces of glass and wood pieces with nails therein, and the broken glass and nails are a menace to the bathers in the surf and to persons on the beaches. Severe bodily injuries have resulted from them. The rental value of property has been impaired because of the deposits. The decayed and decaying vegetables and animal matters cast upon the shore is offensive to a high degree to sight and to smell. The deposits are frequent and recurrent.

In *Cleveland* v. *Citizens Gas Light Company* (20 N. J. Eq. 201, 204), it is said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comforts of human existence is a nuisance which should be restrained, and small noises and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain. Unpleasant odors from the very constitution of our nature render us uncomfortable, and when continued or repeated make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it, and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress."

In *Northwestern Fertilizer* v. *Hyde Park, et al.* (97 U. S. 659), this Court considered a case coming from the Supreme Court of Illinois which involved the question of nuisance. The Company sought to defend because of its

charter rights; but this Court held that the State could give an effectual remedy, saying (p. 667): "It rests upon the fundamental principle that every one shall so use his own as not to wrong or injure another. . . . Pure air and the comfortable enjoyment of property are as much the rights belonging to it as the right of possession and occupancy."

In *Georgia* v. *Tennessee Copper Company* (206 U. S. 230), the State filed its Bill in this Court to enjoin the discharge of noxious gases from the works of defendant in the State of Tennessee. The allegations of the Bill showed that as a result of these gases there was destruction of forest trees, orchards, crops and other injuries. In the course of the opinion it is said: "It hardly is denied and cannot be denied with success that this often is carried by the wind great distances and over great tracts of Georgia land. From the evidence the pollution of the air and the magnitude of that pollution are not open to dispute."

In *Mugler* v. *Kansas* (123 U. S. 623, 673), this Court said: "The ground of equity jurisdiction in cases of purpresture as well as of public nuisance is the ability of courts of equity to give more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened and before irreparable mischief results but arrest or abate those in progress and by perpetual injunction protect the public against them in the future. . . . This is a salutary jurisdiction especially where the nuisance affects the health, morals or safety of the community."

It is well established that noxious smells may constitute a nuisance. (*Baltimore, etc. Railroad Co.* v. *Fifth Baptist Church*, 108 U. S. 317.) In *Block* v. *Baltimore*, 149 Md. 29, 51, where the Maryland court considered a case arising out of the transportation of offensive materials by scows from the city to reduction plants, and says (p. 56): "That the conditions complained of constitute an unwholesome danger and offense is obvious."

Replying to the contention that the bill did not contain allegations sufficient to maintain it, that court, after stating the facts, said (p. 51): "It would be a reproach to the law if it afforded the plaintiff no adequate relief from the burdensome and intolerable conditions shown by those facts."

In *Northwestern Fertilizer Company* v. *Hyde Park, supra,* this Court, adopting the findings of the Illinois Court, said: "That a nuisance of so flagrant character exists, as found by the Court below, is not controverted."

And in *Georgia* v. *Tennessee Copper Company, supra,* this Court granted relief against a nuisance caused by the discharge of gases from the defendant's work in Tennessee, and said (p. 238): "It is a fair and reasonable demand on the part of a sovereign that the air of its territory should not be polluted on a great scale by sulphuric acid gas; that the forests on its mountains, be they better or worse and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control." (See *Missouri* v. *Illinois,* 180 U. S. 208; *Board of Health* v. *Schmidt,* 83 N. J. Eq. 35, 36; *Butterfoss* v. *State Board,* 40 N. J. Eq. 325.)

I conclude that the conditions described in this case amount to a public nuisance, and that the State and communities affected should not be required to tolerate the same.

4. Prescription.

The authorities declare that if the facts develop a public nuisance there can be no prescription. Thus in *Block* v. *Baltimore, supra,* the Maryland court said (p. 59): "But the wrong complained of and disclosed by the evidence amounts to a public nuisance and there can be no prescription"; (citing *Woodyear* v. *Schaefer,* 57 Md. 10).

This Court said in *Northwestern Fertilizer Company* v. *Hyde Park, supra*: "In such cases prescription, whatever

the length of time, has no application. Every day's continuance is a new offense." And in *Missouri* v. *Illinois* (200 U. S. 496, 520), it is said: "The reasons upon which prescription for a public nuisance is denied or may be granted to an individual as against a sovereign power to which he is subject have no application to an independent state."

5. Municipality: Degree of Proof.

But the defendant claims that it is performing governmental functions and entitled to invoke the rule of proof required of plaintiffs in actions between sovereign states. The rule relied upon is stated in *North Dakota* v. *Minnesota* (263 U. S. 364), as follows:

> "In such action by one state against another the burden on the complaining state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in ordinary suits between private parties. Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of another state at the suit of another the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

There is a qualification of the rule stated in a case by the State against a corporation or person. "Some peculiarity necessarily marks a suit of this kind. If the State has a case at all it is somewhat more certainly entitled to special relief than a private party might be" (*Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 237). And further in that case this Court said, at page 238: "'This Court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains that it would have in deciding between two subjects of a single political power."

That the defendant is a political subdivision of the State, created as a convenient agent for exercising certain governmental powers entrusted to it by the State (*Hunter* v. *Pittsburgh*, 207 U. S. 161, 178), or is a department of the state government (*City of Trenton* v. *New Jersey*, 262 U. S. 182, 187) would seem to be settled by these cases.

The fact is that the parent State has left to the defendant the determination of the method to be adopted in carrying out certain duties certainly those with reference to sanitation, and the further fact is that the conditions complained of here are the results of the adoption by the defendant of its own methods. It was not necessary that the defendant dump its garbage at sea except in an emergency. It was put on notice as early as 1907 by a report of distinguished engineers to the Mayor of the City, already referred to, that the method of garbage disposal by dumping it at sea is not the best method. In discussing that method of disposition they said as follows:

> "All the refuse collected could be dumped into the Atlantic Ocean but unfortunately the least harmful material sinks and the foulest floats, so that much of the floating mass will be scattered along the beach through the action of the current and wind. This fouling of the beach creates a nuisance that the public should not be asked to tolerate. The cost of sending the scows so far at sea that there would be no danger of fouling the beaches and the delays and interruptions caused by storms forbid the use of this plan. The dumping of refuse at sea should not be resorted to except in cases of emergency when the burdens of such sea-dumping will be of short duration."

Again in 1921 a Committee appointed by the Mayor of New York, and above referred to, made a report to the Mayor in which they stated as follows:

> "The greatest objection to the present system of disposing of waste material is in connection with the method now being used for getting rid of garbage,

which is both unsanitary and uneconomic. For some years the disposal of garbage not only did not cost the City anything but as a matter of fact returned a small yearly profit. Aside however from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent if they do not openly object to it and there is always the possibility of objection from other communities and from the people claiming that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal."

Prior to this last report the City had been informed by the Supervisor of the Harbor of bad conditions on the shores arising from the dumping at sea. The Mayor requested the right to dump the scows nearer than the area at that time prescribed by the Supervisor. The latter declined the request because of the complaints about the garbage.

The defendant had been satisfactorily using the "reduction" system of garbage disposal when in an "emergency" it was authorized to dispose of it at sea. In the meantime it has erected a number of incinerating plants and plans to erect more. One reason given for the delay in building the needed incinerators is that the defendant was not given the power of condemnation of sites. It has such power now, conferred in 1929, and it is a question whether the defendant, given the right and duty of performing a function that may be called a governmental function but not given the power necessary for its full performance may indefinitely follow a course as heretofore stated to the injury of others and still claim that in such matters it is in the position of the state itself. But if the stricter rule be applied I think the only reasonable conclusion to be reached under all the evidence is that the

objectionable conditions on the beaches and in the adjacent waters complained of in this suit are caused by and due to the action of the defendant in dumping its garbage and refuse into the waters of the ocean as already stated. There has not only been an invasion of serious magnitude of the plaintiff's rights extending through some years but it is continuing and is threatened for an indefinite period.

6. Jurisdiction.

The defendant insists further "that the dumping is done at designated places which are not in the navigable waters of the United States but on the high seas, more than a marine league from the beaches and territorial waters of the state of New Jersey, over which this Court has, in this case, no authority, control or jurisdiction."

There seems to be some inconsistency between the contention of the defendant that the permits of the Supervisor afford protection and yet that the appointed places are not within the navigable waters of the United States.

The authorities cited to this proposition relate to the cases in the District Courts where the question was whether the act complained of was done in the one District or another, the holding being that an action to abate a nuisance must be brought in the District where the nuisance is situated. (*United States* v. *Newark Meadows Improvement Company,* 173 Fed. 426; *McGowan* v. *Columbia River Power Association,* 245 U. S. 352.) In *Mississippi & Missouri Railroad Company* v. *Ward* (2 Black 485), it appeared that Ward sued the defendant, a citizen of Illinois in the District for Iowa, to restrain the continuance of an alleged nuisance arising from the manner of the construction of a bridge over the Mississippi River, the boundary between the two states being the center of the river. The allegation was that the obstruction was on the Illinois side. This Court held that the District Court of Iowa was without jurisdiction, and said (p. 494): "He seeks nothing from

the person of the defendant but seeks to remove a local object because he has sustained certain damages from the object. The District Court has no power over the local obstruction inflicting the injury nor any jurisdiction to make inquiry of the fact whether the damage had been sustained or how much. These facts are beyond the Court's jurisdiction and the inquiry outside of the state."

This Court has, however, a jurisdiction that the District Court did not have. In the present case both the aggrieved and the offending parties are before the Court and subject to its decrees. The property affected is within the United States. (*Massie* v. *Watts*, 6 Cranch 148, 159; *Hart* v. *Sansom*, 110 U. S. 151, 154). In *People* v. *International Nickel Company* (168 App. Div. 245, S. C. 218 N. Y. 644), it was held that fumes from an industrial plant in the State of New Jersey brought by the wind into the State of New York to the injury of citizens of that State did not constitute an indictable nuisance in New York because the offense was not committed in New York. The defendant refers to this case as holding that "the site of this nuisance is in another state." The New York court, however, does suggest that the Supreme Court of the United States would be the forum for trial of such a case.

This Court has taken jurisdiction in just such cases. (*Georgia* v. *Tennessee Copper Company, supra*), where it said (p. 237) that the suit was "by a state for an injury to it in its capacity as quasi-sovereign. In that capacity the state has an interest independent and behind the title of its citizens in all the earth and air within its domains"; and further, "When the states by their union made the forcible abatement of outside nuisances impossible to each they did not there agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground there still remained quasi-sovereign interests and the alternative to force is a suit in this Court."

In *New York* v. *New Jersey* (256 U. S. 296), the plaintiff sought an injunction against the discharge of sewage into

the upper bay, a part of New York harbor, claiming that this discharge constituted a serious injury to health, property and the welfare of the State and citizens of New York. This Court took jurisdiction.

This Court also took jurisdiction in *Missouri* v. *Illinois* (180 U. S. 208), where it was alleged that the turning of Chicago sewage into the drainage canal polluted the Mississippi River and created a nuisance. The controversies were regarded as justiciable by this Court even though finally the bills were dismissed. (See *Wisconsin* v. *Illinois,* 278 U. S. 367; *North Dakota* v. *Minnesota,* 263 U. S. 365; *Pennsylvania* v. *West Virginia,* 262 U. S. 592).

I conclude the Court has jurisdiction.

There is expert testimony that the actual construction period for the building of a 350-ton incinerator would be one year, and that one or more can be completed within that duration of time from the period work starts on them severally. The evidence does not disclose what is a reasonable time for determining the availability of sites and for their acquisition.

My conclusions upon the whole case are that the defendant has created and continues to produce a public nuisance on the beaches and property of the State of New Jersey, as has been hereinbefore found, and that the plaintiff is entitled to relief in accordance with the prayer of the bill; but the defendant should be given a reasonable time within which to put into operation sufficient incinerators to care for its garbage and rubbish. (See *Georgia* v. *Tennessee Copper Company,* supra.)

RECOMMENDATIONS.

My recommendations are:

1. That the Court's decree should declare that the plaintiff is entitled to relief and to an injunction as prayed for, but that before an injunction shall issue a reasonable time

will be accorded defendant within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by defendant at sea.

2. That in as much as the evidence adduced does not disclose what such reasonable time is the case be referred to a Master for findings of fact upon that subject.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 10, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER UPON RE-REFERENCE.

INDEX.

Subject	*Page*
The Question	2
Findings of Fact:—	
General Statement	2
Plan for Incinerators	3
Amounts of Garbage	4
Sites	5
Other Methods of Disposal	6
Separation	7
Proportions	7
Transfers	8
Fills	9
Time for Construction	10
Conclusions	15
Recommendations	16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 13, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER UPON RE-REFERENCE.

Pursuant to the order in this cause of May 18, 1931, the parties plaintiff and defendant, by their respective counsel, having appeared before me at public hearings in the City of Washington on June 29 and 30, 1931, and in New York City on July 21, 22, 23 and 24, 1931, and having presented their evidence and having been heard in argument with respect to the findings of fact, conclusions of law and recommendations for a decree which they have respectively requested; and the matter having been finally argued by counsel at Washington on September 17, 1931, and together with printed abstract of the testimony having been submitted, I have reported the testimony thus taken, with exhibits, by filing the same in the office of the Clerk of this Court, with my certificate; and I now submit to the Court the following report, stating in this connection that the parties by their counsel have agreed upon terms for a decree and the same is filed in the office of the Clerk of this Court.

THE QUESTION.

By the decree of May 18, 1931, the cause was referred to me as Special Master to ascertain and report what would be a reasonable time to be accorded the defendant, The City of New York, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped at sea, or to provide other means, to be approved by the decree, for the disposal of such materials.

FINDINGS OF FACT.

(*a*) *General Statement:*

The City of New York is composed of five Boroughs whose population, according to the Census of 1930, is as follows:

Manhattan	1,867,312
Bronx	1,265,258
Brooklyn	2,560,401
Queens	1,079,129
Richmond	158,346
Total	6,930,446

In Manhattan the resident population is shrinking somewhat; in the Bronx, Brooklyn and Queens it is increasing rapidly, and in Richmond moderately.

The garbage and refuse being dumped at sea goes from the Boroughs of Manhattan and the Bronx. There are now three incinerators in Manhattan and none in the Bronx. The three in Manhattan have a rated capacity of 940 tons per day. There are five garbage incinerators in the Borough of Brooklyn with a rated capacity of 1700 tons per day; nine incinerators in the Borough of Queens, with a rated capacity of 1230 tons per day, and five incinerators in Richmond with a rated capacity of 540 tons per day, making a total of 22 incinerators in the City of New York.

(*b*) *Plan for Incerators:*

The 22 incinerators in the four Boroughs mentioned were in operation in December, 1929, when the Department of Sanitation was created, whose jurisdiction extends, among other things, to the disposition of ashes, garbage, rubbish and street sweepings. In December, 1929, the Sanitary Commission, through its Chairman, made a report to the Mayor of the City setting forth a comprehensive program for the construction of 19 additional incinerators and the repair of two others, as being sufficient in number with the old to consume all garbage and rubbish produced by the City until the year 1945.

On May 1, 1931, the Engineering division of the Department of Sanitation filed its report with the Chairman of the Sanitation Commission, stating that:

"In accordance with your recent instructions the Engineering division has made a careful study of the disposal of rubbish and garbage in the City of New York, and herewith presents a comprehensive plan for the construction of incinerators to take care of the combustible refuse which is now a prolific source of discomfort and complaint.

. . . . . .

You will please note that the present project or plan calls for five incinerators in Manhattan, four in the Bronx and five in Queens; the respective costs of construction being estimated at $5,575,000 for Manhattan, $6,250,000 for the Bronx and $5,375,000 for Queens. An examination of the engineer's report will show that the program will take care of the three Boroughs of Manhattan, the Bronx and Queens up to and including the year 1945, the calculations being based on the 1930 Census, with an allowance of the same percentage of increase as has actually taken place in various boroughs during the last ten years. The construction of the plants recommended will enable each one of these three boroughs to destroy all of the rubbish and garbage produced in each one, and will completely do away with the nuisance caused by the distribution of same in land dumps, water-front dumps and at sea."

He recommended that the first letting be for four incinerators, one in Manhattan, two in the Bronx, and one in Queens, and stated that the three sites have already been acquired and the fourth has been certified for purchase by the Commission.

On May 6, 1931, this report was transmitted by the Chairman of the Sanitary Commission to the Mayor of New York as "a report of the Sanitary Commission on the general plans for rubbish and garbage disposal by the process of incineration". There has been some modification of the general plan for 19 incinerators, occasioned by the decision of the Sanitary Commission to erect new incinerators of larger rated capacity than were formerly contemplated. The evidence shows that the defendant's plan for garbage disposal involves the erection of 14 new incinerators, which will take care of the matter of garbage disposal at least until the year 1945, and that such a plan, if consummated, is a proper and effective means for such disposal.

(c) *Amounts of Garbage:*

The quantities of garbage and refuse now being deposited at sea off the New Jersey coast by the City of New York during the greatest dumping at its peak in summer, from June to September, inclusive, of each year and for some years to come if present methods continue, amounts to an approximate average of 3,000 tons per day. To burn this quantity during the summer months mentioned and to provide for future needs, there should be additional incinerating capacity of 3,000 tons per day to be provided by new incinerators, unless by an increase of consumption by existing incinerators, or some temporary expedients for disposal, the need for new incinerator capacity be correspondingly reduced.

The evidence shows that during one week in June, 1931, the three incinerators in Manhattan and the nine in Queens and the three in Richmond (15 in all) taken collectively actually consumed at least 10 per cent more garbage and rubbish than their rated capacity. Eight of these incinera-

tors were operating 24 hours per day; the other seven for different numbers of hours per day. All were operated six days per week. The five largest plants, operating for 24 hours per day and six days per week, consumed more than 20 per cent in excess of their rated capacity. These results were obtained when the relative percentages of garbage to rubbish were 65 to 70 per cent of garbage and 35 to 30 per cent of rubbish, and sometimes a less percentage of garbage. The evidence shows the better ratio to be 80 per cent of garbage and 20 per cent of rubbish, but that this ratio cannot always be maintained because of the weather and other conditions affecting the rubbish.

The three new 750-ton incinerators may reasonably be expected to consume at least 10 per cent in excess of their rated capacity of 2250 tons per day, which would increase their total consumption to 2475 tons per day, and on the basis of actual performance by the large plants operating 24 hours per day and six days per week, the consumption of garbage and rubbish by the new incinerators may be still further increased. It is not, however, considered prudent to conclude that, with the construction and operation of three 750-ton incinerators, the amount of garbage and rubbish just stated would be consumed. The quantity being disposed of at sea should be provided for and provision for its disposal at times of peak production and its possible increase in the future must be made. The proposed fourth new incinerator should be constructed. The four are planned to take care of garbage and rubbish in the localities mentioned until 1945.

(*d*) *Sites:*

The defendant owns three sites, two of them in the Bronx and one in Manhattan, which were acquired in the years 1927, 1928 and 1929. Upon these three sites it is proposed to erect three incinerators with a rated capacity of 750 tons each per day, and to operate them six days per week. Another site in Manhattan has been under negotiation for

some time, which in July, 1931, was reasonably expected to be acquired and the title closed in the fall of that year.

Upon this site another incinerator of 750 tons rated capacity per day is to be erected. As already stated, it is from these two Boroughs, Manhattan and the Bronx, that the garbage now goes to sea.

Other Methods of Disposal.

(1) The plaintiff introduced testimony tending to show that the present conditions would be ended, pending the construction of additional incinerators, by the transportation of garbage further to sea, an estimated distance of 100 miles, in vessels or scows, and there dumping same. Such a procedure would require vessels or scows to be specially equipped with special appliances, if otherwise the plan were feasible. It would run counter to the conclusions of the Supervisor of the Harbor of New York, stated in the original reference in this case, to the effect that experience has shown that such material dumped at sea is liable to be brought back to the shore at whatever distance it is dumped. The evidence shows that it would require four or five days for scows to make such a trip and return, and also fails to show that such a plan is practicable.

(2) The plaintiff urges that, pending the completion of proposed new incinerators of sufficient capacity to dispose of all garbage and rubbish which, under existing conditions, is dumped at sea, the defendant can and should resort to certain methods or expedients such as (a) a better separation of garbage and rubbish and ashes by householders; (b) the improvement of the relative proportions of garbage and rubbish in the incinerators, and where necessary, the use of some coal as additional fuel; (c) the transfer of excess garbage from one Borough to another where incineration may be had; (d) seven-day operation of all incinerators "when necessary during the peak months of summer"; (e) the dumping of garbage mixed

with ashes or sand in land fills. The defendant takes issue with these contentions.

(a) *Separation*—The defendant has ordinances and regulations requiring the separation of garbage and other substances into four separate classes—garbage, refuse, ashes, and liquid waste, and the use of separate receptacles for them. The evidence shows that in tenement house sections in the Boroughs of Manhattan and the Bronx compliance with these regulations and ordinances is difficult to secure. Many thousands of notices of the requirements of these regulations (printed in four languages) are annually distributed to the householders and others concerned. A force of from 60 to 70 men is kept employed in looking after this matter; and in 1929, when a special "drive" was made to enforce the ordinances and regulations by a considerable addition to the regularly-employed force, the result was a large increase in convictions and fines for violations. The evidence does not show that reasonable efforts to enforce these ordinances are not being made by the defendant.

(b) *Proportions*—The burning of a mixed refuse containing 80 per cent of garbage and 20 per cent of rubbish is the upper limit for operation with satisfactory temperatures and without the use of some coal. The use of this ratio is difficult to maintain. The weather affects the rubbish, and other conditions may reduce its heat-producing qualities. The defendant has two types of plants, the Delcarie and the Sterling, and they are not designed for using coal, though in emergencies some coal may be and has been used. In the Sterling type, being a fire-brick lined furnace, there is a tendency when using coal to get "ballaning", that is, an amalgamation of the fire-brick with the ash, which at various temperatures tends to fuse and to run into any interstices in the brick or between the brick, and when it becomes slightly cold to form a mass the removal of which tends to break up the face of the brick and reduce the life of the furnace. The Delcarie type is a higher-temperature furnace, and because of its peculiar construction is liable,

in using coal, to produce more smoke. The use of some coal in emergencies has been made, but in opening the doors and piling coal on the grates or over a fire already started, rushes of cold air in the combustion chamber and a reduction of temperature occur, which make for disagreeable smoke and the chance of complaint because of gases emitted from the stacks. As already stated, the defendant's largest plant, operating 24 hours per day and six days per week, consumed more than their rated capacity of garbage and rubbish while using certain relative proportions; if brought to the use of the better relative proportion of 80 per cent of garbage and 20 per cent of rubbish, their consumption would be increased.

(c) *Transfer from one plant to another*—The evidence shows that garbage and rubbish from the Boroughs of Manhattan and the Bronx can be transferred to some plants that are not operating on full time of 24 hours per day. The latter are disposing of materials in the localities they were designed to serve, and their full rated capacities are not used in doing so. Difficulties to be met in the making of such transfers may be summarized as the distances involved; the method of transfer; inadequate storage space and disproportionate expense. In times of stress of weather, some garbage otherwise going to sea has been taken to Brooklyn plants. The Sanitary Commission applied to the Board of Estimate and Apportionment for and obtained its leave to modify the contract of the Brooklyn Ash Removal Company to permit excess garbage from other Boroughs to be disposed of in the Brooklyn incinerators. Under this resolution, it is possible to transfer some of the garbage now being dumped at sea to Brooklyn incinerators to the extent of their capacity. The collection of garbage and rubbish for transfer from Manhattan and the Bronx to other places will involve some night collections of garbage in residential districts, and the noises and annoyances incident thereto, besides the transportation of the materials for long distances. There would be an addi-

tional operating force necessary to operate the plants in Queens and Richmond not now running 24-hours per day, and extra drivers for trucks, estimated on a yearly basis to approximate $400,000 in additional costs. The evidence shows that when the three 750-ton plants are in operation any quantities of material they cannot consume that would, under present conditions, be sent to sea could be disposed of by inter-plant adjustments of burning to the limits of practicability, and that such a plan would be a reasonable step to take.

(d) As to the practicability of seven-day per week operation, the evidence is uncertain; in some instances there has been a burning of the residuum left over from operation on Saturday.

(e) *Fills*—Assuming the existence of appropriate places, it may not be said that garbage and rubbish mixed with ashes and used as a fill is an impracticable expedient for their disposal during short peak periods, if thereby the dumping at sea can be avoided. The materials here referred to do not include some things that the original report herein shows were being dumped at sea, but refers to what is generally known as "hog-feeding garbage" and rubbish and ashes. The evidence shows that ashes mixed with a small percentage of garbage taken from Manhattan are being disposed of in part at Rikers Island, part being sent to sea. The defendant has been engaged for some time in filling Rikers Island and the work, nearly completed now, will be finished in about nine months from August 1, 1931. Some other place or places must be made available for ashes and rubbish in lieu of Rikers Island. A plan to use East Island was abandoned because of objection from near-by communities; but to make it available for garbage and rubbish it is shown by the evidence to be necessary to provide much equipment. One of the witnesses stated that the construction of the necessary docks, sea-wall, unloading machinery and other equipment that would be required to make such an island available for the disposal of ashes

and rubbish, would require at least as long a time as the construction of incinerators, which would be the ultimate and final scheme; and Mr. Fuller, another witness, stated that he believed that the effort required to get the land-fill method into practice would be such as to make that particular step not commensurate with what the attempt would call for, in comparison with the program for incineration.

There are some small areas which the defendant has acquired for street purposes which, in the outlying portions of the City may be "filled in". Rubbish may be used in land fills. As an emergency measure, the dumping of garbage with ashes and rubbish has been done in some other cities. The method is not to be recommended, except as an emergency for a limited period.

There are emergencies of one kind or another that make it necessary to transfer garbage from one plant to another in the City of New York. These are temporary expedients. The suggested methods of disposal other than by incineration are likewise temporary. The better method is to erect incinerators sufficient to accomplish the desired end.

TIME FOR CONSTRUCTION.

The plaintiff introduced witnesses who qualified as experts and testified upon the question of the time in which the proposed incinerators could be built, and the defendant introduced expert testimony on the same question. The conclusions stated by Mr. Samuel Greeley, a witness called by the plaintiff, and by Mr. George W. Fuller, a witness called by the defendant, fairly represent the contentions of the respective parties on the question of a reasonable time. Both of these witnesses are eminent engineers with wide experience and well qualified as experts to speak upon the questions submitted to them.

As to the reasonable length of time within which additional incinerators may be installed in New York City,

their conclusions do not differ widely. Mr. Greeley having stated his estimate of the time to be 20 months, said:

"In detail, I am setting that period of 20 months as beginning with the time when sites are determined to be available; that is, when the negotiations have been sufficiently advanced so that their acquisition is considered certain, and I have allowed 2 months for the preparation of general plans and specifications, 1½ months for the taking of bids, 1 month for the awarding of a contract, 4 months for the preparation of detailed plans and specifications, 10 months for construction and 1½ months for test and acceptance. I have in mind that there would be an overlapping of some of those items. Judging from my experience in actual construction and supervision of construction that is an entirely practical and reasonable limit of time. . . . I have taken into consideration the fact that these are municipal plants and I base it upon that fact."

Mr. Fuller testified as follows:

"After the sites are made usable I think, from my experience, it would require for a minimum 21½ months before the plants could be constructed and tested and accepted by the City.

"The first item of the details of that summary is the making of borings on the sites for the incinerators, and I put down here a minimum period of 2 weeks, an average period of 3 weeks.

"The next item would be the design of the superstructure and the submission of plans for the superstructure to the Arts Commission for approval. Those can be done at once, and I have made an estimate of 6 weeks for a minimum and 8 weeks for an average period.

"The next item would be the application to the Board of Estimate and Apportionment for approval of the plans and specifications, and also of the estimate of cost of structures, and the action thereon by the Board. By that I mean the fundamental form in which they may be now placed would have to be made definitely available for the construction of the respective incinerators on the desig-

nated sites corresponding to the plans and specifications. I put down that period required for the action of the Board as 2 weeks for a minimum and 3 weeks for an average period. So that before the sanction of the Board can be obtained for the definite allocation of funds, that is, the sub-appropriation of funds for each respective plan, the period of 10 weeks would occur for a minimum in my opinion, and a period of 14 weeks under average practice. I think those periods which I designated for the 3 respective steps are fairly comparable with Mr. Greeley's estimate of 2 months for the preparation of plans and specifications.

"The next step involves approval as to the form of contract by the Corporation Counsel and the completion of the printing of the same after the receipt of bids for printing. I put that period as 4 weeks under minimum conditions and 6 weeks for average practice. Then there would be a period of advertising and taking of bids, which I put as 4 weeks under minimum conditions and a month under average conditions. A month I thought was a fair period.

"These steps then, after definite provision of funds by the Board of Estimate and Apportionment, and the approval of form of contract and of plans and specifications by the Board of Estimate and Apportionment, those 2 steps would take 8 weeks for a minimum and 10 weeks for an average. That would be comparable to Mr. Greeley's estimate of 1½ months as the time for taking bids.

"The next step would be the award of a contract and the approval of sureties, which I have put down as a minimum of 6 weeks and an average period of 8 weeks. Mr. Greeley gave one month for that.

"In regard to the next step, I have put down 20 weeks for the preparation of the detailed plans by the contractor and their approval by the City authorities, 20 weeks for a minimum and 24 weeks for an average. Mr. Greeley gave 4 months, which is about 17 weeks. I might clarify that statement of mine as to 20 weeks somewhat, from the standpoint that, as I understand it, the approval of the plans and specifications submitted by the contractor would have to be secured from different City authorities; that is, after the bids are received and certain drawings submitted with

the bids, then the contractor to whom the award is made would have to develop certain details. Under the New York City practice—or, I should say under New York State practice—there are certain things that have to be separated, and besides getting the approval of the City building department for the plumbing, for instance, and the gas fitting, that has to be done under state law under separate contract for sizable projects, projects over $25,000, and also steam heating has to be put under separate contract, and in accordance with the prevailing practice, although I think it is not a state law, the Bureau of Electricity in the Department of Water, Gas and Electricity, has to approve all electrical plans and specifications, and they practically request that separate contracts be provided for electrical equipment. So I say, in addition to getting approval of the building department, there are necessarily these other approvals, and that in part, I think, makes plain my 20 weeks as against 17 weeks or 4 months, dealt with by Mr. Greeley; and it also is a reason why I am figuring a difference between minimum and average periods, which is 24 weeks, according to my estimate.

"For the next step I have placed a construction period at 43 weeks for a minimum, and 52 weeks under average conditions. Those correspond to 10 months for a minimum and 12 months for average conditions.

"As to tests and acceptances, I put that 6 weeks for a minimum and 8 weeks on an average, as comparable to Mr. Greeley's estimate of 1½ months. I think I gave you the total number of weeks for the minimum as 93 weeks or 21½ months."

Both witnesses conceded that the time for tests and acceptances could be deferred and the incinerators be put in operation without formal acceptance until some later period, under suitable provisions to that effect in the contract.

Upon the estimates of the two witnesses with reference to time for preparation of plans and specifications it is to be observed that the engineer member of the Sanitary

Commission, testifying in July, 1931, stated that the plans and specifications were then nearly completed.

The nearness of the estimates of these witnesses as to the time within which the three proposed incinerators should be constructed on the sites presently owned is also reflected in the requests by counsel for the respective parties for findings by the Special Master on that subject. There is a wider margin of difference between counsel in the time necessary to put in operation an incinerator on a site not actually acquired in July, 1931, by the defendant.

In considering the question of a reasonable time within which the necessary incinerators could be put into operation there are several important elements:

1. *Availability of funds*—The facts show that appropriations have already been provided for incinerators in various localities. These were provided for smaller plants than are now deemed efficient, and larger plants are proposed to take their places. Therefore it is necessary to take a number of small amounts and add them together to make the larger sum necessary for the present program. Application must accordingly be made to the Board of Estimate and Apportionment to allocate said sums to this particular project. This Board acting favorably, the money is available, and there is no suggestion that the Board will act unfavorably.

2. The defendant is a municipality and may not be expected to act as expeditiously as an individual would. Action by its duly constituted Boards is necessary. It has its zoning regulations, and these are subject to alteration. The statute provides methods for acquiring property by condemnation.

It was appositely said in another case before this Court upon the question of time:

"It should not fix what could be considered to be the shortest conceivable time under highly favorable conditions of work, but should have regard for what may fairly be accepted under average conditions without unjustified delay."

The evidence shows that under existing conditions labor can be secured readily and that this is a favorable time for work of construction. The estimates made by the witnesses do not take into consideration the time that may be lost on account of strikes or unforeseen conditions that may arise beyond the control of the City or the contractors.

CONCLUSIONS.

Upon all the evidence, I conclude that the additional incinerators which the defendant the City of New York has planned to construct in the Boroughs of Manhattan and the Bronx, with a rated capacity of 750 tons each per day, should be ready for operation on or before June 1, 1933, and that until June 1, 1933, is a reasonable time to be allowed the defendant within which to put into effect and operation the necessary incinerators to enable it to dispose of its garbage and materials such as are now being dumped at sea, and to cease disposing of the same by dumping them at sea. This conclusion makes allowance for ordinary contingencies, but not for strikes or contingencies beyond the control of the defendant or its contractors.

The grave consequences that might follow the stoppage of all dumping at sea of such materials before effectual provision is made for their disposal otherwise are mentioned in the letters of the defendant's representatives or agents to the Supervisor of the Port of New York in 1918, when asking leave to dump at sea, and referred to in the former report in this cause.

A reduction in the amount of garbage and rubbish, being dumped at sea, can be made by the use of some of the methods already mentioned, pending the completion of the needed incinerators.

To make suitable provision for the contingencies mentioned, it would be just to the parties for the Court to retain jurisdiction of the case for the purpose of such modification as, upon due application and notice, the Court may determine to be proper.

Recommendations.

Pursuant to the decree of re-reference, it is recommended:

(1) That the decree make the injunction mentioned in the opinion and decree of the Court in this case effective from and after June 1, 1933, and require the defendant and its agents or employees to cease the dumping of any garbage or refuse into the ocean or waters off the coast of plaintiff the State of New Jersey, on and after June 1, 1933.

(2) That the defendant be required to file with the Clerk of this Court on the first days of April and October of each year, beginning April, 1932, a report to this Court setting forth the progress made in the construction of the incinerators in the Boroughs of Manhattan and the Bronx, and the amount of garbage and refuse dumped at sea during the period of the report.

(3) That either party to this cause, on due notice to the other, may apply at the foot of the decree for any modification thereof, and this Court retain jurisdiction for the purpose of any order or decree it may deem proper in the premises.

No recommendation is made as to costs.

Inasmuch as the parties to this cause, by their respective solicitors, have entered into a consent decree which has been filed in the office of the Clerk of this Court, I deem it unnecessary to a full compliance with the Court's decree of re-reference to do more than refer to the consent decree, which amply embodies the foregoing recommendations and includes some other matters.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

State of New Jersey, *Plaintiff*,
vs.
The City of New York, *Defendant*.

No. 10, Original

REPORT OF THE SPECIAL MASTER UPON 2ND RE-REFERENCE UNDER ORDER OF MAY 29, 1933.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

State of New Jersey, *Plaintiff*,
vs.
The City of New York, *Defendant*. } No. 12, Original

REPORT OF THE SPECIAL MASTER UPON 2ND RE-REFERENCE UNDER ORDER OF MAY 29, 1933.

Pursuant to the order in this cause of May 29, 1933, the parties plaintiff and defendant, by their respective counsel, having appeared before me at public hearings held in the City of New York, July 10th and 11th and 17th, and September 12th, 1933; at Asbury Park, New Jersey, on September 25th and 26th, and again in New York City on October 2nd, 1933, I have reported the testimony thus taken, with exhibits, by filing the same in the office of the Clerk of this Court with my certificate.

Counsel were invited to argue the questions involved, but one of them expressing a preference to present brief and request for finding, that course was adopted. Counsel for both sides have furnished memorandum briefs with request for findings and conclusions.

QUESTIONS.

The decree of the Court entered May 29, 1933, appointed me as Special Master to take evidence that might be offered by the respective parties, and also such as the Master might deem necessary to show:

1. What shall have been done by defendant up to September 15, 1933, and the time reasonably required to enable it to comply with the decree (namely, the decree entered December 7, 1931);

2. The amount that shall have been expended subsequent to June 1, 1933, by the State of New Jersey and its political subdivisions to prevent or lessen the defilement or pollution of the waters, shores or beaches within that State, and the damages respectively sustained by them as the result of defendant's failure to comply with the decree.

GENERAL STATEMENT.

(a) On September 22, 1931, the Sanitary Commission of New York City addressed a communication to the Board of Estimate and Apportionment, enclosing three copies of the proposed form of contract and specifications to be used in advertising for bids for the erection of four destructor plants, and requested approval of the same. They also requested in this communication "sub-authorizations of existing corporate stock funds" for the erection of four destructor plants on city-owned land, one in Manhattan, two in the Bronx, and a fourth on land to be acquired in the Borough of Queens. The estimated cost of these incinerators was $1,000,000 each, with an additional $400,000 for the land in Queens, making an aggregate estimate of $4,400,000. The communication pointed out that "The available corporate stock authorizations for incinerators and their present balances" included certain designated

authorizations and suggested that the sub-authorizations be made from them in designated amounts. This communication of September 22, 1931, transmitting the proposed contracts, plans and specifications to the Board of Estimate and Apportionment for approval and the authorization of funds appeared on the Board's calendar at its meeting held September 25, 1931, and was referred to that Board's committee of the whole and to its secretary for report.

At the meeting of the committee of the whole held on October 6, 1931, this matter was adjourned for three weeks to the meeting of October 27, 1931, when it was again adjourned two weeks to the meeting of November 10, 1931. During these postponements the engineers in the office of the secretary of the Board of Estimate and Apportionment were considering the plans and specifications and were in frequent conference and consultation with members of the staff of the Sanitary Commission concerning details of the plans and specifications. They made suggestions which finally resulted in the transmission by the Sanitary Commission under date of November 14, 1931, to the Board of Estimate and Apportionment of revised plans and specifications. This communication was referred to the committee of the whole and the secretary of the Board on November 20, 1931.

At a meeting of the committee of the whole of the Board held December 1, 1931, the said requests of the Sanitary Commission of September 22 and November 14, 1931, were laid over until December 8, 1931, and on the latter date were again laid over for one week, at which time the committee of the whole voted to restore the matter to the Board calendar and recommended approval of the terms and conditions of the contract, plans and specifications.

At the meeting of the Board of Estimate and Apportionment December 18, 1931, a large delegation claiming to be residents and tax payers appeared and through their

spokesman entered objections to the proposed construction of the incinerator in the Bronx, to be located at Cromwell and River Avenue and 150th Street. At their request the Mayor put the matter over until the next regular meeting, namely, January 15, 1932, and at that meeting the Board of Estimate and Apportionment approved the request of the Sanitary Commission to make a change in the Use District map, so as to alter from a business to an unrestricted district part of the incinerator site at West 215th and 216th Streets not then included within an unrestricted zone.

By January 15th, 1932, practically all of the other necessary procedure required to be observed by charter prescription in respect of contracts before advertising for bids, such, for instance, as the approval as to form by the Corporation Counsel of the proposed contract forms and specifications, and the advertisement for the solicitation of competitive bids, had been carried out. Authority to proceed with the solicitation of bids on the four incinerator contracts was all that remained to be had. The Chairman of the Sanitary Commission was requested by the Mayor to submit a statement showing how the funds necessary for these contracts would be expended, in what proportions and over what period of time. In his reply the Chairman transmitted to the Mayor estimates that during the first ten months the payments would average about $350,000 a month on account of all four contracts, and in addition personal service charges against the work would run about $50,000 per year.

At the meeting of the Board of Estimate and Apportionment held on January 22, 1932, the matter of the approval of the contracts was again postponed for two weeks, to February 5th, and on that date it was again put over for two weeks, to February 19, 1932, and postponements were later made until February 26th and then until March 4, 1932, when the matter of the approval of the terms and

conditions of the four contracts was laid over for one week and referred to a new committee known as the Ways and Means Committee, created by the Board "to report on all matters requiring the present or future expenditure of money."

On March 9, 1932, the Sanitary Commission addressed a letter to the Mayor of the City urging that action be taken in the matter of the approval of the contracts and called his attention to the provision in them for completion of the four incinerators on or before March 31, 1933, in order that the plants could be tested and be in operation before June 1, 1933, the date fixed in the decree of the Supreme Court of the United States for the cessation of dumping at sea. This communication from the Commission was presented to the Board of Estimate and Apportionment by the Mayor at its meeting on March 18th, and then the matter was laid over for two weeks, to April 1, 1932, and was then laid over pending action by the Ways and Means Committee. From that date the Board did not carry on its calendar any matters requiring the expenditure of funds of a nature such as this item, and they were all carried in the Committee on Ways and Means.

The item again appeared in the Board calendar of June 17, 1932. A communication of the last named date addressed by the chairman of the Sanitary Commission to the chairman of the Board of Estimate and Apportionment was presented, submitting a number of corrections that should be made in the contracts and specifications for the incinerating plants, and on June 17, 1932, the Board of Estimate and Apportionment approved the terms and conditions of the contracts, specifications and drawings as revised in accordance with the letter of that date from the Sanitary Commission, but with the proviso that the bids be taken with three bases of performance, namely, in 200 working days, 250 working days and 300 working days, with the right to award on any of these three bases.

Among the changes in the contracts as authorized was the omission therefrom of the proposed incinerator at Crowell Avenue in the Bronx. The bids as authorized called for the erection of three incinerators, and the bids were to be subject to reconsideration by the Board before approval of the contracts. The changes adopted by the Board required some delay in the necessary re-printing of the "bid book" or parts of it, which printing was promptly done.

Advertisements for bids for the three incinerators commenced July 15, 1932, and named August 10 as the date for the receipt of bids. The city furnished with the contracts and specifications what is called a "typical plan", but each bidder was permitted to design a size of building that would fit his particular furnace or plant, and had to submit certain general plans.

The invitation to the bidders to bid on more than one contract and the city's offer to give the successful bidders two or three, and the proposal inviting bids on the different bases of completion within 200, 250 or 300 working days, resulted in the receipt of a total of 188 bids from 8 different bidders.

On August 7, 1932, the Sanitary Commission summoned two of the bidders to appear for examination in accordance with the terms of the proposal. They appeared on August 18th and were examined at length.

On August 18th and subsequent dates letters were sent to other bidders and at different dates some of these appeared for examination as to their bids.

On September 12, 1932, the Sanitary Commission adopted the report of its engineer member, made after a full examination of the several bids, and recommended its adoption by the Board of Estimate and Apportionment. This report recommended that the contracts for the three incinerators be awarded to the Superior Incinerator Company of Texas and the L. E. Myers Company. The bids of

these bidders on the three incinerators taken separately aggregated $2,225,000, but they proposed that if the contracts for the three incinerators were awarded to them they would make a deduction reducing their bid for the three plants to $2,136,000, making an average of $712,000 for each of the three plants.

On September 12, 1932, this report of the engineer member of the Sanitary Commission was adopted and, together with the bids received, the plans of bidders and copies of the stenographic examination of four of the bidders, and some other papers, were transmitted to the chairman of the Board of Estimate and Apportionment and delivered at the office of the secretary of the Board on that date. It appeared on the calendar of the Board of Estimate and Apportionment at its meeting September 30th, 1932.

During the week beginning September 12, 1932, a conference had been held in the Mayor's office, attended by the chairman of the Sanitary Commission, the engineer member thereof and others, at which time the acting Mayor directed the chairman of the Sanitary Commission to proceed with the examination of the other four bidders in the same manner as the Commission had examined the four bidders above referred to.

Under date of September 27, 1932, copies of the examination of the second set of four bidders were transmitted to the secretary of the Board of Estimate and Apportionment and to the acting Mayor direct.

On October 11, 1932, the communication dated September 12th from the Sanitary Commission was on the calendar of the committee of the whole, but the report of the engineers of the office of the secretary of the Board not being ready, it was laid over for two weeks, to October 25, 1932. At the meeting of the committee of the whole held on October 25, 1932, the discussion was confined almost entirely to the plants proposed to be erected on Northern Boulevard at 226th Street, in the Douglaston area of the Borough of

Queens, being one of the three incinerators above mentioned. The committee of the whole voted to refer back to the Sanitary Commission for further consideration and report the matter of this 750-ton incinerator in the Douglaston area. Consideration of the contracts for the other two incinerators was deferred to the meeting of November 1st, 1932.

On November 1, 1932, at the meeting of the committee of the whole of the Board of Estimate and Apportionment, after discussion of the two remaining contracts for incinerators, one in Manhattan and one in the Bronx, the committee of the whole, on motion of the acting Mayor, voted to restore the matter to the calendar of the Board of Estimate and Apportionment. This recommendation of the committee of the whole appeared on the calendar of the Board of Estimate and Apportionment at its meeting of November 11, 1932, when it was laid over one week and referred to the Comptroller for report.

On November 8, 1932, the Comptroller having reported in the meantime, the Board of Estimate and Apportionment adopted a resolution authorizing the Sanitary Commission to award contracts for the erection of a destructor plant at 215th Street in Manhattan at a bid price of $696,395, and a contract for the erection of a destructor plant at Zerega Avenue, the Bronx, at the bid price of $713,140, the total amount for both plants being $1,409,535. The contracts were on the basis of performance in 200 consecutive working days but did not include the plumbing and heating of the incinerators.

Under date of November 23, 1932, the Sanitary Commission in the regular procedure followed in the awarding of city contracts notified the two successful bidders of the award, directed them to submit their sureties to the Comptroller, and called their attention to the procedure to be followed in so submitting sureties. The Comptroller was

also advised of the award, and on November 23, 1932, the contracts were executed by the contractors.

On December 20, 1932, the Comptroller approved the sureties that had been submitted, and on this date the Sanitary Commission sent to the contractors a copy of the executed contracts, and also sent a copy of each contract to the Comptroller to be "registered" by him, as provided by law. He affixed his certificate to each of them on December 23, 1932.

The contracts called for the completion of the two incinerators with a capacity of 750 tons each in 200 working days, but did not include heating and plumbing. These items are, by the laws of the state of New York, required to be awarded by separate contract.

The contracts required the contractors to prepare and submit to the Sanitary Commission plans and specifications for the plumbing and heating work to suit the building and the furnaces they were installing.

Between March 17, 1933, and April 11, 1933, the Sanitary Commission received from the contractors plans and specifications and tracings, and on April 11, 1933, the mechanical engineer of the Sanitary Commission completed an estimate of the cost of the heating and plumbing work for each plant, based on the specifications and plans received from the contractors.

On April 12, 1933, the Commission applied to the Mayor, in accordance with the rules of the Board of Estimate and Apportionment, asking his permission to present to said Board two contracts, one of them for plumbing work and one for heating work for the two plants, at an estimated cost of $40,000 for plumbing and $20,000 for heating. This permission was granted on April 24, 1933.

Between the last named dates, April 12th and 24th, the Municipal Assembly of the City of New York adopted local law No. 5, effective April 13, 1933, whereby the Sanitary

Commission was abolished and a single commissioner called "Commissioner of Sanitation," was made the head of the Department of Sanitation.

On April 25, 1933, the Commissioner of Sanitation transmitted to the chairman of the Board of Estimate and Apportionment copies of each of the proposed contracts, plans and specifications for plumbing and heating of the two incinerators, and urged that action be taken with all convenient speed.

On May 19, 1933, the Board of Estimate and Apportionment adopted a resolution approving the terms and conditions of these contracts for plumbing and heating.

It appears that the legislature of New York by an act effective May 5, 1933, amending the labor law of the State requires all contracts for public work in the State to have annexed to them a schedule of wages to be paid workmen, laborers and mechanics on such public work, and making it in New York the duty of the Comptroller to arrive at such schedules and supply them to the various departments concerned.

On May 25, 1933, the Department of Sanitation called to the Comptroller's attention the proposed contracts for heating and plumbing, and asked for the schedule of wages to be paid, in accordance with said Act. There followed considerable correspondence between these branches on the subject. No contract for the heating and plumbing had been made up to October 2, 1933.

Construction of the two incinerators was commenced March 21, 1933. On October 2, 1933, the incinerator for Manhattan was 34 per cent complete, and the incinerator for the Bronx was 20 per cent complete.

The chief engineer of the Department of Sanitation was produced as a witness by defendant on July 17, 1933, and again on October 2, 1933. Between those dates he had been made Commissioner of Sanitation in succession to Mr.

George McAneny, who had been appointed Comptroller. This officer expressed the opinion that at that time, in July, the two incinerators could not be completed within the contract time. He stated that the operation of the two incinerators would reduce the necessity of dumping at sea by a large amount but not completely, and that the disposal of the excess of garbage at sea could be suspended by defendant if it uses some other means of disposal. He then outlined a schedule he had prepared for disposing of the excess, which included an additional incinerator in either Manhattan or the Bronx, and an extra one in Brooklyn and refuse burners in Manhattan, and also included a substitute for Rikers Island, which had been used for some years by defendant for the disposal of refuse and ashes and some garbage. Rikers Island was then practically filled and another place in Jamaica Bay called West Island was being considered.

The president of one of the contracting companies was called as a witness on motion of the plaintiff and agreed that the incinerators under construction were about 34 per cent and 20 per cent completed, and that work on the plants was being delayed by the absence of work on plumbing and heating, the contracts for which had not yet been let.

FINANCES.

The plaintiff introduced as a witness the chief accountant of the department of finance. He explained the method of financing improvements such as the building of incinerators to be by funds obtained from the sale of corporate stock notes which are redeemable by the issuance of long-term bonds known as corporate stock or serial bonds, and that these can be sold under sealed bids after advertisement. He said that the corporate stock note is simply a

"forerunner" to enable the city to borrow as it needs to borrow, without borrowing millions of money in advance of actual needs, and that when the Board of Estimate and Apportionment had authorized an improvement and payments thereon, it did not mean that the money was available unless the Comptroller were able to sell corporate notes or to have a long-term bond sale. He testified that from early in March, 1931, the defendant had not been able to have a long-term bond sale and that on that date, March 4, 1931, it had a bond sale of $100,000, which was to take up corporate stock notes already issued, but leaves $9,000,000 of corporate stock notes outstanding, while there were contract liabilities besides of $189,000,000, which contract liabilities had been registered on authorizations duly made by the Board of Estimate and Apportionment. There was a large amount of corporate stock notes outstanding for the independent subway, and on the 4th of May, 1931, a sale was held of $52,000,000 of four-year bonds, and because of that fact the "bankers" agreed to bid for them under competitive bidding and sealed bids. This sale in May, 1931, and the one in March, 1931, were, according to this witness, the last sales of 4-year bonds or long-term bonds.

In January, 1932, the legislature restricted the issue of corporate stock notes by the city to $200,000,000, but the new notes could be issued for a period not exceeding five years. Prior to that time the corporate notes were issued for one year with the right of renewal. The "bankers" took $100,000,000 of these notes to take up $76,700,000 of outstanding notes, and paid $23,300,000 in cash.

There were approximately $94,000,000 of corporate notes outstanding in June, 1933.

In 1931 the defendant spent on subway construction about $70,000,000, in 1932 about $80,000,000, and in 1933 the witness estimated the expenditures for the subway were $6,000,000.

The aggregate budgets for several years, less the amount of debt service within such budgets, for all departmental purposes were as follows:

1930	$394,363,870.90
1931	419,783,466.58
1932	424,655,959.67
1933	358,667,962.88

The witness stated that he had never known of payments for such work as that of building incinerators being paid out of the budgets, that such payment would be contrary to the provisions of the city charter, and that since the sale of the corporate stock notes issued as above stated under the last Act of the Legislature, the defendant had been unable to sell any more bonds or stock notes.

With reference to the incinerator contracts the witness stated that every voucher that had come from the contractors for these two incinerators had been paid, and that the city had "a little money left of our corporate stock borrowings to pay whatever else comes along for the next couple of months." These contracts provide for progress payments.

In April, 1933, the "bankers" refused any further loans. The city cannot sell any kind of securities at less than par, and its 6 per cent corporate stock were in July, as stated by this witness, on the market at a discount. The city has not offered to sell corporate stock notes for incinerator purposes alone.

On October 2, 1933, the Special Master called as a witness Mr. George McAneny, who at that time was Comptroller of the city of New York. He had been Commissioner of Sanitation under the re-organization made in April, 1933, already mentioned, whereby the Sanitary Com-

mission of three members was abolished and the Department of Sanitation was created. He stated that the testimony of the chief accountant of the Department of Finance had covered rather thoroughly the subject of funds for building incinerators and that there had been no sales of corporate stock for a long time. He further stated that a program had been developed under his instruction looking to a 100 per cent incineration, but that how long it would take to execute that program depended upon the dates on which funds were provided, and that the city was unable in October, and had been for a considerable length of time, to borrow money for these purposes; that he could not say at what time dumping at sea could be stopped under present conditions. He said that in view of the uncertainty as to the city funds his plan included a request for moneys from the Reconstruction Finance Corporation (R. F. C.), that would enable the city to make a start on the plan for incineration, which is "coupled with the broad subject of our needs for sewage disposal as well." He expressed the opinion that the application to the R. F. C. would go forward within the next two or three weeks.

EXPENDITURES.

At a hearing held in Asbury Park, New Jersey, September 25 and 26, 1933, a number of witnesses were introduced by plaintiff, who testified relative to the expense of removing deposits on the beaches between June 1st and September 15th. There was also introduced a book of 64 photographs identified as having been taken on and along the beaches, and showing deposits thereon between the dates of June 9th and September 1st. The witness was employed by the State to examine beaches and make observations of

their condition, and began work on July 24th. On that day the beaches of Highland, Monmouth and Seagirt showed no garbage; North Long Branch, Asbury Park, Deal and Allenhurst had very little garbage. At Chadwick photograph No. 51 showed a number of crates, cans, oil cans, electric light bulbs, radio tubes, bottles, and a small amount of garbage amongst the refuse—meaning by "garbage" decayed fruit and vegetables.

On July 25th at Mantoloking Beach, picture No. 56, there were on the beach dead animals, cans, bottles, wooden floor blocks, banana stems, electric light bulbs and orange peelings.

On July 27th two pictures were taken at Point Pleasant showing bottles, electric light bulbs and rotted fruit, such as oranges, grape fruit, melon rinds and vegetables.

On August 5th at Bradley Beach there were orange peelings, rotted melons and vegetables.

On August 9th the beaches from Highland down to Seaside Park were clear, and on August 11th the beaches from Highland Beach to Manasquan were clean, and a small amount of garbage consisting of orange and lemon skins, grape fruit and dead chickens were in the undertow about to be washed up at Point Pleasant, Lavallette and Seaside Park.

On August 12th at Mantoloking Beach as far as the eye could see there was garbage strewn.

From August 14th to 18th, inclusive, the beaches from Seaside Park to Highland Park were clean.

On August 23rd, on the beaches at Ocean Grove, Bradley Beach, Avon, Delmar, there were bottles, cans, driftwood, decayed fruit and vegetables, and the beaches at Manasquan, Point Pleasant, Bayhead, Mantoloking, Lavallette and Seaside Park had a large amount of garbage, fruits and vegetables, besides driftwood, broken furniture, cases,

bottles and electric light bulbs in windrows along the beach. At Mantoloking, along with the refuse on the beach there was a dead fowl and a dead dog.

On August 24th at Highland Beach there were some electric light bulbs and a small amount of orange skins and parts of grape fruit. At Seabright some driftwood, cans and bottles. At Asbury Park the tide had taken out a lot of refuse and garbage brought in the preceding day.

At Bradley Beach the picture showed garbage and refuse thrown back of the bulkhead below the boardwalk.

At Delmar and Avon the beaches were fairly clean, except that where they extended back from the water there remained what had been brought up the previous day in the way of garbage and driftwood and bottles.

At Spring Lake the beaches were clean to within 25 feet of the boardwalk, but from that point to the boardwalk and beyond in the street were bottles, cans, electric light bulbs and some fruit, orange skins, grape fruit and melon rinds.

Pictures 1 to 9, taken at Point Pleasant, show conditions on August 24th, the date of a heavy storm.

On August 25th pictures taken at Bradley Beach and Avon showed the refuse and garbage along with driftwood brought up by the storm.

On August 29th pictures No. 30 and 31 were taken at Spring Lake, showing a great number of bottles, electric light bulbs, radio tubes, jugs and driftwood. Picture 32 shows a pile of refuse, including cans and bottles, decayed fruit and vegetables with driftwood, parts of furniture, garbage and rotted fruit mixed with it.

Another witness testified that at Bayhead Beach there were, between June 15th and September 15th accumulations on the beach of various kinds, fruits and vegetables and dead animals, and that accumulations of garbage and

refuse occurred at least three times and amounted each time, he estimated, to three or four tons.

In rebuttal the defendant offered evidence tending to show that some of the materials found upon the beach did not come from the dumps. Its witnesses testified to a regular practice of salvaging bottles at the places where garbage and refuse are dumped into the scows to be transported to sea, and that this work is done by a contractor who is under contract with the city of New York to reclaim materials going into the scows. He stated that there is picked each week, on an average, 50 to 60 barrels of bottles at every dump.

The defendant adduced testimony to show that no material was dumped at sea on designated days in June, July and August, but the same accumulated material was dumped on other days.

Commencing July 17, 1933, the defendant was granted permission to dump and did dump garbage and refuse at a place ten miles further out at sea than the general location of dumping on prior occasions. This more distant location is about 35 miles distant from the New Jersey shore.

There was testimony relative to the drift and sinking of garbage dumped in August, when on two occasions an officer of the defendant made observations at the 35-mile location. This testimony was to the effect that the drift was not toward the New Jersey shore.

The defendant showed that during the months of June, July and August, and until September 15th, the number of vessels passing the Jersey coast was 4459, taken from the records of the Monmouth Beach Coast Guard station. In this number there was included boats of all character and description.

The expenditures for removing garbage and refuse from New Jersey beaches from June 1st to September 15th, 1933, are as follows:

Municipality	*Cost*
Sea Girt	$134.25
Ocean Grove	8.10
Avon	66.28
Spring Lake	262.95
Seaside Park	510.00
Seaside Heights	164.00
Manasquan	215.34
Bradley Beach	35.00
Point Pleasant Beach	764.87
	$2,160.79

It was stated by counsel for the plaintiff that a number of other witnesses appearing could not show the expenditures because of the method in which the accounts had been kept.

Mr. Goodrich, who was chief engineer of the Department of Sanitation of the City of New York, under appointment by Mr. McAneny when the latter was Commissioner of Sanitation, and who when he testified on October 2nd, 1933, had become Commissioner of Sanitation, was asked by defendant's counsel whether, upon the construction of the two incinerators now being built the city of New York would be able to suspend the dumping of garbage and refuse and other materials at sea, and he replied: "Not from the results of the construction of those two incinerators, no." He was further asked:

"Q. Upon the completion of the incinerators is it your intention positively to discontinue the dumping of material at sea, other than ashes?

"A. I don't see how it can be done.

"Q. When will the city of New York be able to suspend the dumping of garbage and refuse at sea?

"A. After the completion of additional facilities." (Record page 590-591.)

Further, on page 592, this witness testified:

"Q. Now, you say that to prevent dumping at sea you will have to do two things: build additional incinerators and increase the capacity of others existing, or rebuild some of them. Is that right?

"A. Correct.

"Q. And up to the present time is there anything that would justify an expression of opinion on your part as to when that could be accomplished?

"A. If we can get these funds from the R. F. C. it could be done inside of a year.

"Q. Inside of a year?

"A. Yes.

"Q. But if the Government don't loan the money you have no answer to make have you?

"A. Exactly."

During one of the hearings before the Special Master it was given as an excuse for the absence of an expected witness that he, with other city officials, was discussing with the Governor of the State the question of a special session of the legislature to give authority to the city to levy special taxes for stated purposes. It does not appear that funds were sought for incinerators at the proposed extra session nor at the last session of the legislature. The charter of the city of New York as amended provides that corporate stock may be issued for various specified purposes, among them, "for the erection and equipment when first erected of buildings for garbage and rubbish disposal plants and dumps."

CONCLUSIONS.

Upon consideration of all of the evidence, the briefs and requests for findings by counsel, my conclusions are stated as follows:

1. Up to September 15, 1933, the defendant had authorized two contracts, and on that date there were under construction under these two contracts two incinerators, one of them located in Manhattan, the other in the Bronx. The two incinerators had a rated capacity of 750 tons of garbage per day each. The contracts for their construction were executed November 23, 1932, and called for their completion within 200 working days, the price being $696,395 and $713,140, respectively, an aggregate of $1,409,535, except that the necessary plumbing and heating for the two incinerators was not included in the terms of the two contracts mentioned, but were excepted therefrom. The law requires that contracts for plumbing and heating shall be awarded separately from the construction contracts.

On September 15, 1933, and on October 2, 1933, the contracts for plumbing and heating in the incinerators had not been awarded.

The work required by the two contracts for incinerators was 34 per cent complete as to one and 20 per cent complete as to the other on October 2, 1933. The Commissioner of Sanitation, an engineer, estimated that the two plants would be ready for operation on April 21 and June 30, 1934, respectively. The representative of the contractor estimated an earlier completion, but both of these estimates are subject to contingencies such as weather, non-working days and others, besides the delay in awarding the contract for the completion of the work on plumbing and heating.

The completion of the two incinerators under construction, with a capacity of 750 tons each, will not enable the defendant to suspend dumping of garbage at sea. This can only be done, as stated by the Commissioner of Sanitation, "after the completion of other facilities."

2. The question of "the time reasonably required to enable defendant to comply with the decree" does not admit of a definite answer under the evidence adduced. The defendant introduced evidence in 1931 which showed that 21½ months was a reasonable time within which incinerators could be built after the sites were ready, and this period included the preliminaries leading to the authorization of contracts under that execution. The parties by counsel then agreed, and filed a proposed decree to the effect that June 1, 1933, was a reasonable time within which the defendant could comply with the former decree relative to a cessation of dumping garbage at sea.

The contention by defendant's counsel before the Special Master is that the delay in performance within the time set in the former decree "has been due entirely to unforeseen, unpredictable and insolvable problems arising solely from the inability of defendant to sell its corporate stock securities wherewith to secure moneys necessary to defray the expenses for the construction of incinerators." The plaintiff contends that no sincere effort to comply with the decree appears.

The evidence shows much delay in authorizing the contracts, as above shown, an inability on the part of the defendant as late as October 2, 1933, to dispose of corporate stock notes or long-term bonds, and that such inability existed for a considerable period, extending back into 1932. It further shows that projects such as the building of incinerators by the city are required to be financed primarily from the sale of corporate stock notes, which in turn are converted into serial or long-term bonds.

In the report of the Special Master upon re-reference of this cause in 1931 there is a statement that the funds for the erection of four proposed incinerators were then available. This statement was based upon the testimony of a member of the Sanitary Commission, who in answer to a question stated that the money was available. (Record of hearings, 1931, Vol. 6, pages 687-689.)

Under the testimony adduced at this hearing the above statement is in error and the sale of authorized corporate stock notes or bonds is necessary.

If the defendant were required to show, within a stated time before the date fixed for the completion of the two incinerators, what the result of its application to the Reconstruction Finance Corporation, or the result of any application to the legislature had been upon the question of funds, the time reasonably necessary to enable defendant to complete the work or comply with the decree could be more satisfactorily determined.

3. The municipal subdivisions of plaintiff have expended, between June 1, 1933, and September 15, 1933, to prevent or lessen the pollution of the waters, shores or beaches of New Jersey, resulting from defendant's failure to comply with the decree, the sum of $2,160.79.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

FILE COPY

APR 4 1

CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. [redacted]iginal 13 10

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

EXCEPTIONS OF THE DEFENDANT TO THE REPORT OF THE SPECIAL MASTER AND HIS RECOMMENDATIONS FOR DECREE AND TO HIS FAILURE TO FIND AS REQUESTED BY DEFENDANT.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
THOMAS W. A. CROWE,
of Counsel.

(22036) M. B. Brown Printing & Binding Co., 37-41 Chambers St., N. Y.

IN THE

Supreme Court of the United States

October Term, 1930.

No. 17, Original.

STATE OF NEW JERSEY,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.

EXCEPTIONS OF THE DEFENDANT TO THE REPORT OF THE SPECIAL MASTER AND HIS RECOMMENDATIONS FOR DECREE AND TO HIS FAILURE TO FIND AS REQUESTED BY DEFENDANT.

Now comes The City of New York, the defendant above named in the above entitled suit and objects and excepts to the report of Hon. Edward A. Campbell, the Special Master, herein filed in the office of the Clerk of this Court on the 20th day of March, 1931, in the following particulars, to wit:

A. That this Court has jurisdiction to grant the relief demanded in the Bill of Complaint because among other things the suit is one to protect quasi sovereign rights of the plaintiff, because the defendant is before the Court, and the property affected is within the United States.

1. To so much of the conclusion, or purported conclusion, of law, set forth under the heading "Parties and

Jurisdiction" (Report of Special Master, p. 9), as concludes that the case presents a justiciable controversy over which this Court has jurisdiction.

1a. To so much of the finding of fact or conclusion of law, or both, set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 58), as finds that in the present case, both the aggrieved and the offending parties are subject to its (this Court's) decrees.

2. To so much of the finding of fact or conclusion of law, or both, set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 58) as finds that the property affected is within the United States.

3. To so much of the conclusions of law set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 59) as concludes that this Court has jurisdiction.

4. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 49) that The City of New York has not dumped garbage and refuse in the ocean for many years in any appreciable quantities within a marine league (three nautical miles) of the shores of the State of New Jersey, except on rare occasions either when necessary to preserve life where a scow was in danger of foundering or when there is some unauthorized action upon the part of the individuals employed by the contractors in charge of the scows or towboats.

5. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 50) that the territorial waters of the plaintiff do not extend more than one marine league or three nautical miles from the Atlantic Coast shore line of said State of New Jersey at low water mark.

6. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 51) that the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid are not within the territorial limits of the plaintiff.

7. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 53) that the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid, are not within the navigable waters of the United States.

8. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusions of Law 3 and 4) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12 and 22 miles, respectively, from the Atlantic shore of the State of New Jersey, or much more than one marine league from said shore and its waters, was not and is not a dumping thereof in the navigable waters of the United States.

9. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 5) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Lightship and from the New Jersey shore as stated in Exception No. 8, was not and is not a dumping thereof in the territorial waters of the State of New Jersey.

10. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 6) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Lightship and from the New Jersey shore as stated

in Exception No. 8, was a dumping thereof on and into the high seas.

11. To the failure and refusal of the Special Master to conclude as a matter of law, as requested by the defendant (Proposed Conclusion of Law 15) that by reason of the dumping in the Atlantic Ocean by the defendant of garbage and refuse at the places, in the manner and under the conditions aforesaid, no justiciable controversy between the plaintiff and the defendant is presented over which the Supreme Court of the United States has authority, jurisdiction or control under Article III, Section 2 of the Constitution of the United States or any other article of said Constitution or under any statute of the United States or under the Common Law.

B. That garbage and refuse in large quantities dumped by the defendant in the Atlantic Ocean more than a marine league from the shores of the waters of the plaintiff is driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance, to the great injury of the plaintiff's rights and property.

12. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement, and the mass moves at times westward and northward or towards the shores of New Jersey or Long Island according to the direction and velocity of the wind.

13. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that the mass spreads out on the surface of the water gradually breaking up into smaller areas and moving for indefinite periods with the wind, some of the materials being on the surface and some in suspension.

14. To so much of Finding of Fact (16) (Report of Special Master, p. 26) as finds that some of the lobster fishermen have followed the floating garbage from the place where it is dumped by the defendant in the ocean to where it went ashore on New Jersey's beaches.

15. To so much of Finding of Fact (16) (Report of Special Master, p. 26) as finds that about 25% of the self-addressed, stamped postal cards deposited in sealed bottles dropped in garbage in the ocean immediately after the dumping by New York City scows came back to the parties depositing same by mail from persons along the New Jersey and Long Island shores and from further north.

16. To so much of the Finding of Fact (7) (Report of Special Master, p. 16) as finds that the deposits of garbage and refuse produce unhealthful conditions interfering with and frequently preventing the comfort and enjoyable use of the beaches and sea, it being dangerous to leave children unattended on the beach while the deposits are there because of things they may pick up, some of the same being unmentionable; that broken glass and nails in pieces of wood have been the cause of severe wounds to persons on the beach or in bathing, and that it is a menace to health and tends to injure business and property values and rental values.

17. To so much of the Finding of Fact (7) (Report of Special Master, p. 16) as finds that during June, July and August, 1929, there were in Asbury Park, a considerable increase over the preceding year of cases of external otitis which is a swelling or inflammation of the ear canal, and of cases of infection of the middle ear requiring the drum to be opened, and of sinus affected cases resulting from bathing in the ocean, and that one or more of the coast guard incurred a skin infection from the water which gave them considerable trouble.

18. To so much of the Finding of Fact (16)—Appearance and Movement—(Report of Special Master, p. 27) as finds that large parts of these floating and submerged areas of garbage and refuse, dumped by the defendant are driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water, hereinbefore described:

19. To so much of the Finding of Fact, or Conclusion of Law, or both, set forth under the heading—Some Questions of Law—1. Trespass (Report of Special Master, p. 41) as finds that large areas of garbage and refuse floating upon or held in suspension by the water, which have been dumped by defendant's scows, are driven and carried by wind and water to and upon the shores of plaintiff and other portions or areas thereof are held for indefinite periods in the waters above soil owned by plaintiff and do great injury to fishing and bathing in such waters.

20. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—3. Nuisance" (Report of Special Master, pp. 50-51) as finds that the conditions on plaintiff's shores and adjacent waters produced by garbage and other objectionable materials alleged in the bill are proved by uncontradicted evidence. A summary of the facts found may be stated as follows: Along the shores are many summer resorts and their beaches, and when unaffected by the bad conditions mentioned are pleasure grounds for thousands of visitors. * * * The deposits interfere with, and until removed frequently prevent, the use and enjoyment of the beaches for the purposes to which the latter are adapted and for the comfortable and enjoyable use of which people visit them. * * * Many visitors leave the resorts because they cannot use the beaches when littered or secure the surf bathing when the waters adjacent hold garbage and refuse in suspension and the chief value of the shores below high water mark and the soil under

the adjacent waters for at least three nautical miles is in the fisheries and the fact that they can and do afford the attractions pertaining to summer resorts, which fisheries and attractions are seriously interfered with by the deposits in question.

21. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—3. Nuisance" (Report of Special Master, p. 53) as finds that conditions described in this case amount to a public nuisance, and that the State and communities affected should not be required to tolerate the same.

22. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—5. Municipality—Decree of Proof" (Report of Special Master, pp. 56-57) as finds that even if the stricter rule of evidence be applied, I think the only reasonable conclusion to be reached under all the evidence is that the objectionable conditions on the beaches and in the adjacent waters complained of in this suit are caused by and due to the action of the defendant in dumping its garbage and refuse into the waters of the ocean as already stated and that there has not only been an invasion of serious magnitude of the plaintiff's rights extending through some years but it is continuing and is threatened for an indefinite period.

23. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—6. Jurisdiction" (Report of Special Master, p. 59) as finds that the defendant has created and continues to produce a public nuisance on the beaches and property of the State of New Jersey and that the plaintiff is entitled to relief in accordance with the prayer of the bill.

24. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 46) that six different inspections made by an official

from the Office of the United States Supervisor of the Harbo of New York in February, March and April, 1929, of garbag dumpings by New York City scows at the 8 and 12 mil dumping points where the drift of the garbage was followe for periods of from 12 to 24 hours each did not reveal a singl occasion when the garbage reached any shore.

25. To the failure and refusal of the Special Master t find as requested by the defendant (Proposed Finding o Fact 48) that when dumped, the lighter portion of the gar bage floats while the heavier portion sinks, but that gradu ally some of that which at first floated, sinks, leaving a very considerably smaller portion floating at the end of 24 hours than at the time of dumping.

26. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 52) that garbage and refuse dumped by the defendant into the ocean as aforesaid, has not found its way in any substantial quantities into the territorial waters or onto the beaches of the plaintiff.

27. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 54) that the dumping of garbage and refuse at sea as aforesaid by defendant, has not caused substantial injury to the navigation of the ocean by the plaintiff or its citizens or visitors.

28. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 55) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to bathing or bathing rights or property connected therewith on the part of the plaintiff or any of its citizens or visitors.

29. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of

Fact 56) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to fishing or fishing rights or property used in connection therewith of plaintiff or its citizens or visitors.

30. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 57) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not substantially injured or menaced and does not substantially injure or menace the health, safety, comfort or welfare of the State of New Jersey or any of its citizens or visitors thereto.

31. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 58) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to the commerce of the plaintiff or its citizens.

32. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 59a) that the prevailing winds along the coast of the plaintiff range from southwest to northwest—offshore winds.

33. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 60) that the dumping of garbage and refuse at sea by defendant as aforesaid, has not caused and does not cause any substantial depreciation to the value of the plaintiff's property or that of its citizens, has not retarded and does not retard the economic development of plaintiff's territory, and that of its municipalities in any substantial manner and does not impose in any substantial manner upon plaintiff's municipalities and inhabitants a constant or considerable expense in removing defendant's garbage and refuse from public and private property.

34. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 65) that the plaintiff failed to produce on the trial of this action, any scientific or expert evidence as to the effect of ocean currents or tides upon the movement of objects dumped into the ocean at from 10 to 22 miles from the New Jersey shore, and floating partially or wholly submerged in the ocean.

35. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 7) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not obstructed and does not obstruct or impede the navigation of the waters of the United States or of the State of New Jersey.

36. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 8) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not injured or destroyed and does not injure or destroy the bathing or fishing rights or property therein of the plaintiff or its citizens or visitors thereto.

37. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 9) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not regulated or destroyed and does not regulate or destroy the commerce of the State of New Jersey and/or its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution of the United States or of any statute of the United States.

38. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant

(Proposed Conclusion of Law 10) that the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse, has not taken and does not take any property or right of the plaintiff and/or its citizens, without due process of law in violation of Article XIV, Section 1 of the Constitution of the United States.

39. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 13) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not deprived and does not deprive the plaintiff and/or any of its citizens of the natural advantages of its or their position along the seashore contrary to the sovereign rights of said State as a member of the Union or of any of such rights.

40. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 16) that the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid, of garbage and refuse, has not been and is not an unreasonable disposition of the same as a matter of law.

41. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 18) that the plaintiff herein must prove its claims and case against the defendant herein by clear and convincing evidence.

42. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 19) that the plaintiff herein failed to prove by clear and convincing evidence that any substantial portion of the garbage and refuse which found its way into the waters of the State of New Jersey or onto

its shores or beaches was that which was dumped into the Atlantic Ocean by the defendant.

43. To the failure and refusal of the Special Master to conclude as a matter of law, as requested by the defendant (Proposed Conclusion of Law 17) that the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid, of garbage and refuse has not created and does not create a public nuisance as a matter of law in respect to the plaintiff and/or its citizens or visitors or a public nuisance which seriously impairs the usefulness, wholesomeness and safety of the waters, beaches and shore-front facilities of the plaintiff or its citizens or damages the property of said plaintiff, its municipalities and citizens or their health, safety and welfare.

C. That compliance by the defendant with the provisions of the Act of Congress of June 29, 1888 (29 stat. 209) as amended and the permits to dump garbage in the Atlantic Ocean at a distance in excess of one marine league from the shores of New Jersey issued by the Supervisor of the Harbor of New York in accordance with said Act, do not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

44. To so much of the Finding of Fact set forth under the heading "Some Questions of Law—2. Permits" (Report of the Special Master, p. 45) as finds that the Act (29 Stat. 209, as amended) contemplated that the Supervisor prescribe certain limits, but there is no evidence in this case as to what limits were prescribed.

45. To so much of the Finding of Fact on Conclusion of Law or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 47) as finds, or purports to find, that although the defendant dumps its garbage under permits issued by the Supervisor of the

Harbor of New York at points in excess of one marine league from the shore of New Jersey, it is difficult to understand how that fact affords any defense in this case.

46. To so much of the Conclusion of Law set forth under the heading "Some Questions of Law—2. Permits" (Report of the Special Master, p. 47) as concludes that the authority of the Federal Government does not extend beyond the requirements of navigation.

47. To so much of the Conclusion of Law set forth under the heading "Some Questions of Law—2. Permits" (Report of the Special Master, p. 48) as concludes that the powers which the Supervisor has under the statute and the effect to be given the permits authorized to be issued are to be strictly construed because of the effect of the dumping upon the rights of others.

48. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 48) as concludes that the fact that the defendant is a municipal corporation does not afford immunity from the results of its own action.

49. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 49) as concludes that the Act of 1888, as amended, furnishes no defense to the defendant and that compliance with permits from the Supervisor of the Harbor acting under the provisions of that Act does not furnish a defense nor relieve it from the effect of a public nuisance resulting from or created by its action.

50. To the failure and refusal of the Special Master to conclude as a matter of law as requested by defendant (Proposed Conclusion of Law 14) that the dumping in the Atlan-

tic Ocean by the defendant as aforesaid of garbage and refuse under permit from, and supervision of, the Government of the United States through its Supervisor of the Harbor of New York and in accordance with the provisions of Title 33, Chapter 9, Sections 441-451 inclusive, U. S. Code (approved June 30, 1926) and preceding statutes on which founded, is a compliance with each and every regulation and statute of the United States relating to navigation, commerce and/or any other subject over which Congress has exercised the jurisdiction of the United States.

D. That such garbage and refuse as reaches the plaintiff's shores from the dumpings by coastwise and other vessels and from other sources is negligible in comparison with that dumped by defendant and reaching plaintiff's shores and constitutes no defense to plaintiff's complaint.

51. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 31.) as finds, or purports to find, that there is evidence that only some coastwise and other vessels discharge garbage refuse into the ocean.

52. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 31) as finds, or purports to find, that a witness introduced by the defendant made an estimate to the effect that there were only twenty vessels a day going and coming from southern ports to New York.

53. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 35) as finds or concludes that testimony that some vessels discharge garbage and refuse after clearing from New York, falls short of establishing a custom by other vessels.

54. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 36) as finds, or purports to find, that whatever garbage and refuse reaches the plaintiff's shores from coastwise and other vessels and other causes and other dumpings than those of the defendant are negligible in comparison with that constantly being dumped by the defendant and frequently carried by winds and waves from the dumping places to and upon plaintiff's shores as hereinbefore stated.

55. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 27) that the scows of private contractors, having no connection with the City of New York, containing "cellar dirt," i. e., debris from buildings that have been torn down consisting of joists, timbers, laths, plaster, etc., of a very light kind have for years been dumped and are being dumped into the Atlantic Ocean under permit from the Supervisor of the Harbor of New York at a point about 4 miles southeast of Scotland Lightship.

56. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 33) that cargoes of condemned foodstuffs, vegetables, fruits, etc.) are also dumped at sea under permit from the Supervisor of the Harbor of New York at a point 25 miles from the New Jersey shore.

57. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 34) that Brooklyn Navy Yard scows containing refuse and garbage also dumped at sea at the regular dumping points at which New York City garbage is dumped.

58. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 35) that the Supervisor of the Harbor of New York in his report for 1929, stated that it is probable that a great deal

of garbage is dumped both outside and inside the harbor entrance by the enormous tonnage passing in and out of New York Harbor and also that the local floating equipment throws more or less garbage overboard.

59. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 36) that the records of the Collector of the Port of New York show that in 1928-1929 the following was the number of vessels clearing from or entering such port from points south thereof for periods of two months at a time; months of December 1928 and January 1929, foreign and coastwise vessels entering, 1,227; clearing, 1,173. Months of July and August, 1929, foreign and coastwise vessels entering, 1,105; clearing, 1,192.

60. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 37) that the sea lane or route for coastwise ships going to and coming from points south of New York is about 2½ to 3 miles over the New Jersey coast at Seabright, Monmouth Beach and Asbury Park; 5 miles at Sea Girt and 8 miles at Barnegat Lighthouse.

61. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 38) that practically all freight and passenger ships leaving and entering New York Harbor (especially those leaving) dump more or less garbage and refuse in such sea lane.

62. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 39) that many freight and passenger lines and ships feed their crews in port and none of their garbage or refuse is removed by the City or disposed of by the ship while in port, but such accumulations consisting of bottles, tin cans, electric light bulbs, pieces of meat, fruit, other food waste, wood,

mattresses, pillows, shoes, old clothes, boxes, barrels, crates, etc., are dumped after passing Scotland Lightship.

63. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 40) that passenger and freight ships often anchor in great numbers during a fog for 24 hours or more outside of the harbor and dump garbage accumulated during that period into the sea where they are anchored.

64. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 41) that the holds of cargo boats are usually swept in port after the removal of the cargo and before reloading; that such sweepings and also sweepings from the forecastle are placed on deck for dumping in addition to garbage and refuse and all are dumped in said sea lane for coastwise ships shortly after passing Scotland Lightship on the way south.

65. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 42) that fruit, vegetables, poultry and other supplies delivered to the ships in port to feed passengers and crews, are usually packed in crates, barrels and boxes which have the names on them of New York dealers from whom they are bought, and such crates, boxes and barrels, partly broken up, are on most ships piled on deck and dumped with other refuse in said sea lane shortly after passing Scotland Lightship on the way south.

66. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 45) that insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park on the Atlantic Coast of New Jersey has been and is being discharged into the Atlantic Ocean within a short distance from the beaches of each of those cities.

67. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 64) that from 1896 to 1918, except for a few months in 1903 (1906) no New York City garbage and only a part of its refuse was dumped at sea, yet during that period a large amount of garbage and refuse was washed up into the New Jersey waters and onto its Atlantic shore front beaches.

68. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 66) that the deposit in substantial quantities in the Atlantic Ocean at points varying from 2½ to 8 miles from the Atlantic shore front of the plaintiff State commencing with the minimum distance at Sandy Hook and extending to Barnegat Lighthouse where the maximum distance existed, of garbage, refuse and cellar dirt (material taken from demolished buildings in New York City) by steamships and other floating equipment and by scows of private contractors, of the same kind and character as that deposited in said ocean as aforesaid by defendant much further away from said shore front of the plaintiff, and the deposit of garbage and refuse in said ocean by the United States (Brooklyn) Navy Yard authorities at the points where defendant dumped and the deposit in said ocean less than ½ mile from plaintiff's said shore front of insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park, makes it impossible to determine as a fact, whether garbage and refuse and other offensive matter in substantial quantities is deposited by defendant in the waters of the State of New Jersey or on its beaches.

69. To the failure and refusal of the Special Master to conclude as a matter of law as requested by defendant (Proposed Conclusion of Law 20) that by reason of the deposit in substantial quantities of garbage, refuse, cellar dirt and unsanitary sewage in the Atlantic Ocean by agencies

other than defendant, at points much nearer the coast of plaintiff or no further therefrom than where the deposits of garbage and refuse are made by defendant in said ocean as aforesaid, it is impossible to determine whether such garbage and refuse deposited by defendant in said ocean off the coast of the plaintiff, reaches its waters and beaches in substantial quantities, and therefore defendant is not liable to the plaintiff for the injuries alleged to have been suffered by the plaintiff, its citizens and visitors.

E. Particular exceptions to the Special Master's report and to his failure to find facts and make Conclusions of Law as requested by defendant and in support of its contention that on all of the evidence, a case for equitable relief in favor of the plaintiff, was not made out.

70. To so much of Finding of Fact (14)—Supervisor's Reports—(Report of the Special Master, p. 23) and of Finding of Fact (17)—Incinerators—(Report of Special Master, p. 29) as finds that the first incinerating plant was put in operation by the City of New York in February, 1924.

71. To so much of Finding of Fact (17)—Incinerators—(Report of the Special Master, p. 30) as finds that the evidence does not show the cause of the apparent delay by the defendant in adopting and putting into operation the incinerating system, and that it was in 1924, some five years after the defendant began dumping at sea, that its first incinerator was put into operation, and during the next succeeding five years other were built. That those constructed and in use fall far short of taking care of the garbage and refuse situation.

72. To so much of Finding of Fact, or Conclusion of Law, or both, (17)—Incinerators—(Report of Special Master, p. 30) as finds that the delay of the defendant in adopting a proper method of disposal has been unreasonably long.

73. To the failure or refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 17) that three incineration plants were built in the Borough of Manhattan as a result of an appropriation of $5,000,000 made in July, 1921, the first being completed in February, 1924, the second in November, 1925, and the third on October 1, 1928, the cost of each incinerator being about $1,000,000, exclusive of the cost of the land on which built.

74. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 19) that the commencement of building operations on a fourth site was halted by injunction duly obtained in the Supreme Court of the State of New York.

75. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 20) that in the Borough of Brooklyn there are two incinerators, each with the capacity of 100 tons a day and three with a capacity of 500 tons a day each, all now in operation, built by a contractor under a contract to dispose of all material that may be delivered, and since December 1, 1929, no garbage from that borough has been dumped at sea.

76. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 21) that in the Borough of Queens there are now nine incinerators operating with an average daily garbage and refuse consumption of from 100 to 270 tons and that borough has never dumped any of its garbage at sea.

77. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 22) that in the Borough of Richmond there are now three incinerators in operation and none of the garbage from that borough has been or is now being dumped at sea.

78. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 24) that approximately only 27 per cent. of the garbage collected in the City of New York is dumped at sea, the greatest proportion of which comes from the Borough of The Bronx, and such amount will be continually reduced.

79. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 63) that the dumping in the ocean by the defendant more than a marine league from the New Jersey coast at points 8, 12 and 20 miles southeast of Scotland Lightship designated by the United States Supervisor of the Harbor of New York and under conditions imposed by him of about 27 per cent. of the garbage collected by said City is not in fact an unreasonable disposition of its total garbage collections, pending the carrying out of its plans for the installation of additional incinerators.

80. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 61) that the size, summer population, property investments and assessed value of property of practically all of the New Jersey communities and municipalities located along the Atlantic Ocean shore front from Highlands to Seaside Park has increased greatly during the period from 1919 to 1929, during which the City of New York has been dumping a portion of its garbage and refuse into the Atlantic Ocean as aforesaid.

81. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 62) that, although much more garbage and refuse has been dumped at sea by the City of New York during the summer months than during those of winter, the summer population of, and visitors to, all of the New Jersey Atlantic shore front communities and municipalities claimed by plaintiff to have been injured, is and are many times greater than in winter.

82. To so much of the Finding of Fact set forth in the report of the Special Master under the heading "Some Issues of Fact," page 34, as finds that as to the Long Branch sewer the evidence consists only of a plan of the sewage system and some evidence that complaints were at one time made to the Department of Health, which investigated the same, and that the matters were satisfactorily adjusted.

83. To so much of the Finding of Fact set forth in the report of the Special Master under the heading "Some Conclusions of Law," page 50, as finds that some scows have left upon them considerable quantities of garbage or refuse after their gates have been thrown open to release the contents, and these remnants are cast off by the men in charge as the scows are being taken back from the dumping area, and that the general practice continues, more materials being dumped in 1929 than in the preceding year.

84. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 3), that by Chapter 378 of the Laws of 1897 of the State of New York, known as The Greater New York Charter, various municipalities of the State of New York were united and consolidated into the City of New York, which was thereby divided into five boroughs, known, respectively, as the boroughs of Manhattan, The Bronx, Brooklyn, Queens and Richmond.

85. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Findings of Fact 5 and 6), that by said Chapter 378 of the Laws of 1897 of the State of New York, a Department of Street Cleaning was created in the municipal government of said city, with jurisdiction over the removal and disposition, as often as the public health required, of ashes, refuse, street sweepings and garbage collected in said city, but that by Chapter 466 of the Laws of 1901, jurisdiction over the removal and dis-

position of said substances collected in the Boroughs of Queens and Richmond was transferred to the presidents of said boroughs.

86. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 7), that by Local Law No. 13 of 1929, of the City of New York (duly adopted by the Municipal Assembly of said city in accordance with the provisions of Chapter 363 of the Laws of 1924 of the State of New York) in force from and after December 1, 1929, amending and supplementing said provisions of said Greater New York Charter, as amended, a Department of Sanitation was created, to which was transferred jurisdiction over the removal and disposition of ashes, refuse, street sweepings and garbage collected in all of said five boroughs of said city.

87. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 15) that, on collection, this garbage is taken to docks or dumping boards on the waterfront of said city and is then dumped into city-owned barges, which are designated by the initials of the departmental name and letters of the alphabet, and these are towed to sea by tugboats chartered from, and in charge of, contractors, and the contents are there dumped.

88. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 1), that the defendant, The City of New York, is a municipal corporation and a political subdivision of the State of New York, administering governmental functions in the localities described in Sections 1 and 2 of Chapter 378 of the Laws of 1897 of the State of New York, as amended by Chapter 466 of the Laws of 1901 of said State, and subdivided into five boroughs therein described.

89. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant

(Proposed Conclusion of Law 2), that the Department of Street Cleaning and the Presidents of the Boroughs of Queens and Richmond of the City of New York, for many years prior to and until December 1, 1929, and thereafter the Department of Sanitation thereof, had jurisdiction in said city over the removal and disposition, as often as the public health required, of ashes, refuse, street sweepings and garbage in said city.

90. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 12), that the dumping in the Atlantic Ocean by the defendant, as aforesaid, of garbage and refuse has not violated, and does not violate, Public Laws of New Jersey, 1882, page 155 (3. Compiled Statutes of New Jersey "Pilots", Sec. 47, p. 3958), nor any other statute of the State of New Jersey.

91. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 21), that the plaintiff has failed to prove facts sufficient to constitute a cause of action in equity for the relief demanded in the complaint or for any relief whatever in equity.

92. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 22), that the defendant is entitled to a dismissal of the complaint herein, with costs to the defendant.

F. Recommendations for Decree.

The defendant also objects and excepts to the recommendations for a decree made by the Special Master in the following particulars:

93. To subdivision No. 1 (Report of Special Master, pp. 59-60) in its entirety.

94. To subdivision No. 2 (Report of Special Master, p. 60) in its entirety.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York,
Solicitor for the Defendant.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
THOMAS W. A. CROWE,
Of Counsel.

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Office Supreme Court, U. S.
FILED
OCT 1 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

12

No. 12, ORIGINAL.

STATE OF NEW JERSEY,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.

To the Supreme Court of the United States:

Pursuant to the Decree of this Court in the above entitled cause, dated December 7, 1931, the defendant, The City of New York, respectfully presents the following report to this Honorable Court:

1. The following is a statement of the progress made in the matter of the construction of incinerator plants for the final disposition of garbage and rubbish in The City of New York during the period from April 1, 1932, to September 30, 1932.

The Board of Estimate and Apportionment of The City of New York at a meeting duly held on June 17, 1932, adopted a resolution (Cal. No. 34) approving of the terms and conditions of three contracts each for the erection of one Destructor Plant complete (excepting plumbing and heating work), for the incineration of garbage and rubbish at three of the sites referred to in the second paragraph of the first report of this Defendant dated March

31, 1932, to wit, a site located in the Borough of Manhattan, one of the sites located in the Borough of The Bronx and the site located in the Borough of Queens.

This resolution of said Board directed that the costs of such contracts be charged against Corporate Stock of The City of New York in the manner in such cases provided by its Charter.

Advertisement for sealed bids on said three contracts commenced in the City Record, published by The City of New York, July 13, 1932, and bids therefor were received and publicly opened on August 10, 1932.

In all, a total of one hundred and eighty-eight (188) bids were received and nineteen (19) separate sets of plans were submitted by bidders.

It was first necessary for the engineering staff of the Department of Sanitation to check against the plans and 542 sections of the City's specifications issued by the Sanitary Commission as part of the City's proposal to bidders, the plans submitted by the bidders in relation to the variant elements of the City's proposal in order to determine the real lowest bidder thereon. It was also necessary for the Sanitary Commission to examine the apparent or probable lowest bidders as to their ability, experience, facilities, resources and liquid assets to perform the contract work.

The tabulating, computing and checking of the bids commenced August 11, 1932. The oral examination of the four apparent or probable lowest bidders was commenced August 18, 1932. The tabulating, computing and checking of the bids was computed on August 16, 1932, and the oral examination of the four bidders apparently the lowest was completed September 10, 1932.

At a special meeting of the Sanitary Commission held September 12, 1932, the said Commission adopted a resolution transmitting the bids received, the examination of the bidders, and a report of its Engineer Member

to the Board of Estimate and Apportionment, with its recommendations for the award of said contracts.

This was so done in accordance with the resolution of the Board of Estimate and Apportionment, above referred to, approving of said contracts for advertising, which said resolution contained a condition that the Sanitary Commission should submit the bids received to the said Board, before the making of any award, for the approval of the said Board.

Subsequent to such submission made as aforesaid, the Sanitary Commission was requested and directed by The Mayor of The City of New York, on September 16, 1932, to proceed and examine four other bidders and transmit to the said Board the results of such examinations for its consideration.

In accordance with said request and direction, the examination of said four other bidders was commenced on September 19, 1932, and the record of such supplementary examinations was transmitted to the Board of Estimate and Apportionment on September 27, 1932.

The aggregate amount of the bids of the lowest formal bidders on the three contracts is the sum of Two Million One Hundred Thirty-Six Thousand ($2,136,000) Dollars.

2. During the period of six months commencing March 8, 1932, and ending September 7, 1932, the amount of the garbage and ashes dumped at sea was the following:

Month	Dumpers	Cubic Yards Ashes	Garbage	Total
March 8 to 31, 1932	109	135,490	36,471	171,961
April	131	155,103	45,739	200,842
May	109	116,810	51,899	168,709
June	106	97,487	67,808	165,295
July	89	84,432	53,926	138,358
August	96	83,123	64,137	147,260
Sept. 1 to 7th	23	19,589	16,475	36,064
TOTAL	663	692,034	336,455	1,028,489

All of which is respectfully submitted.

Dated, New York, September 30, 1932.

WILLIAM SCHROEDER, JR.,
Chairman, Sanitary Commission
of the City of New York.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

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APR 1 1

Supreme Court of the United States

No. 10 Original—October Term, 1931

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

REPORT OF THE DEFENDANT, THE CITY OF NEW YORK

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

SUPREME COURT OF THE UNITED STATES

No. 13, Original—October Term, 1931.

STATE OF NEW JERSEY,
Plaintiff,
against
THE CITY OF NEW YORK,
Defendant.

To the Supreme Court of the United States:

Pursuant to the Decree of this Court in the above entitled cause, dated December 7, 1931, the defendant, The City of New York, respectfully presents the following report to this Honorable Court:

1. The Sanitary Commission, the head of the Department of Sanitation of the City of New York, is the Municipal Agency vested with and exercising exclusive jurisdiction over the matter of the removal and final disposition of ashes, garbage, and rubbish of the City of New York.

2. The following is a statement of the progress made in the matter of the construction of incinerator plants for the final disposition of garbage and rubbish in the City of New York for the period, October 1, 1931, to March 31, 1932.

On October 23, 1931, the defendant, The City of New York, duly selected an additional site for the erection and construction of a new incinerator, being a piece of land located on the northerly side of Northern Boulevard and 226th Street, Douglaston, Borough of Queens, and having an area of 249,775 square feet; that following such selection, proceedings were begun in the Supreme Court of the State of New York to condemn the said lands so selected as a site for the construction of an incinerator plant, and that title to the said lands so selected was vested in the City of New York on December 31, 1931.

Contracts, specifications and plans for the construction of four incinerator plants, each having a capacity for the incineration of 750 tons of garbage and rubbish in twenty-four hours, were prepared and transmitted to the Board of Estimate and Apportionment of the City of New York for approval thereof and the authorization of the expenditure of Municipal funds required for the carrying out of said contracts. One of the incinerator plants, construction of which is called for by the four contracts hereinabove referred to, will be erected on the site located at Douglaston hereinabove referred to, and the other three incinerator plants will be erected and constructed on sites duly acquired for such purpose by the City of New York prior to October 1, 1931; two of which latter sites are located in the Borough of The Bronx of the City of New York, and the third site located in the Borough of Manhattan of the City of New York.

3. During the period commencing December 7, 1931, being the date of the Decree herein, and ending March 7, 1932, the amount of the garbage and ashes dumped at sea was the following:

Month	Cubic Yards			
	Dumpers	Ashes	Garbage	Total
December 7 to 31, 1931	113	145,645	49,073	194,718
January, 1932	138	167,519	52,182	219,701
February, 1932	138	167,722	59,316	227,038
March 1 to 7, 1932...	31	37,045	11,521	48,566
Total	420	517,931	172,092	690,023

All of which is respectfully submitted.

Dated New York, March 31, 1932.

WILLIAM SCHROEDER, Jr.,
Chairman, Sanitary Commission
of the City of New York.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 8, Original.

12 10

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

REPORT OF THE CITY OF NEW YORK.

WILLIAM SCHROEDER, JR.,
Chairman, Sanitary Commission
of the City of New York.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

MINNICK PRESS NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 13, Original.

STATE OF NEW JERSEY,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.

TO THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the Decree of this Court in the above entitled cause, dated December 7, 1931, the defendant, The City of New York, respectfully presents the following report to this Honorable Court:

1. The following is a statement of the progress made in the matter of construction of incinerator plants for the final disposition of garbage and rubbish in The City of New York during the period from October 1, 1932 to March 31, 1933.

The statement under this heading in the last report, dated September 30, 1932, carried the recital of facts down to a point where the bids received for the construction of incinerator plants were pending before the Board of Estimate and Apportionment of The City of New York for their approval or disapproval as to the proposed awards thereon.

At a meeting of the said Board of Estimate and Apportionment held on November 18, 1932, a resolution was duly

adopted authorizing the Sanitary Commission of the Department of Sanitation of The City of New York to award two contracts for the erection and equipping complete (excepting plumbing and heating) of two Destructor Plants for the incineration of garbage and rubbish, each capable of destroying 750 tons of refuse in 24 hours, one each to be located as follows:

(A) At 215th to 216th Streets, 9th to 10th Avenues, in the Borough of Manhattan.

(B) At Zerega and Lafayette Avenues and Westchester Creek, in the Borough of The Bronx.

Pursuant to such approval so obtained from the Board of Estimate and Apportionment, the Sanitary Commission at a special meeting duly held at its office in the Borough of Manhattan on November 23, 1932, adopted resolutions awarding the said two contracts to the Superior Incinerator Company of Texas and The L. E. Myers Co., joint bidders, the contract for the plant in the Borough of Manhattan at a contract price of $696,395.00 and the contract for the plant in the Borough of The Bronx at a contract price of $713,140.00.

The contracts were executed by the Chairman of the Sanitary Commission, acting for The City, and by the Contractors on November 23, 1932, and registered by the Comptroller of The City of New York, in accordance with Charter requirements, on December 23, 1932.

On March 22, 1933, the work of actual construction of each of these plants was commenced at each of the sites.

2. During the period of six months commencing September 8, 1932, and ending March 7, 1933, the amount of garbage and ashes dumped at sea was the following:

		Garbage (In Cubic Yards)	*Ashes (In Cubic Yards)*	*Number of Dumpers*
September 8-30,	1932.....	47774	75099	79
October	"	54350	108172	105
November	"	41181	137002	116
December	"	44656	182317	152
January	1933.....	43280	184002	152
February	"	36728	169493	138
March 1-7,	"	9076	92609	35
TOTALS	.....	277045	948694	777

All of which is respectfully submitted.

Dated, New York, March 31, 1933.

WILLIAM SCHROEDER, JR.,
Chairman, Sanitary Commission
of the City of New York.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

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CHARLES ELMORE C
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Supreme Court of the United States

No. 18 Original—October Term, 1933.

STATE OF NEW JERSEY,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.

REPORT OF THE DEFENDANT, THE CITY OF NEW YORK.

PAUL WINDELS,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.

(23329) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

Supreme Court of the United States

No. 12, Original—October Term, 1933.

State of New Jersey,
Plaintiff,

vs.

The City of New York,
Defendant.

To the Supreme Court of the United States:

Pursuant to the Decree of this Court in the above entitled cause, dated December 7, 1931, the defendant, The City of New York, respectfully presents the following report to this Honorable Court:

1. The following is a statement of the progress made in the matter of construction of incinerator plants for the final disposition of garbage and rubbish in the City of New York during the period from March 22, 1933 to March 31, 1934.

(A) Manhattan Incinerator.

On March 31, 1934, the work of constructing this incinerator plant was 80 per cent. complete.

(B) Bronx Incinerator.

On March 31, 1934, the work of constructing this incinerator plant was 70 per cent. complete.

2. Since the filing of the previous report by the above-named defendant, the following is a statement of the quantities of garbage and ashes dumped at sea:

	Ashes (*In Cubic Yards*)	*Garbage*	*Number of Dumpers*
1933			
March 8-31	129,890	27,671	106
April	129,152	36,688	110
May	127,246	63,166	123
June	92,194	86,007	113
July	70,855	89,708	101
August	56,861	112,119	85
September	52,978	116,215	86
October	94,943	90,870	100
November	155,672	57,048	119
December	178,778	55,199	130
1934			
January	221,233	60,237	161
February	175,076	37,826	130
March 1-7	52,065	12,145	37
Totals	1,536,943	844,899	1,401

All of which is respectfully submitted.

Dated, New York, March 31, 1934.

THOMAS W. HAMMOND,
Deputy and Acting Commissioner
of Sanitation of The
City of New York.

PAUL WINDELS,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York,
Municipal Building,
Borough of Manhattan,
City of New York.